DOCKET

No. 08-1498
Vide 09-89
Title: Eric H. Holder, Jr., Attorney General, et al., Petitioners
v.
Humanitarian Law Project, et al.
Docketed: June 4, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-56753, 05-56846)
Decision Date: December 10, 2007
Rehearing Denied: January 5, 2009
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 24 2009	Application (08A846) to extend the time to file a petition for a writ of certiorari from April 5, 2009 to May 5, 2009, submitted to Justice Kennedy.
Mar 24 2009	Application (08A846) granted by Justice Kennedy extending the time to file until May 5, 2009.
Apr 22 2009	Application (08A846) to extend further the time from May 5, 2009 to June 4, 2009, submitted to Justice Kennedy.
Apr 22 2009	Application (08A846) granted by Justice Kennedy extending the time to file until June 4, 2009.
Jun 4 2009	Petition for a writ of certiorari filed. (Response due July 6, 2009)
Jul 6 2009	Brief amicus curiae of James J. Carey, et al. filed.
Jul 6 2009	Brief of respondents Humanitarian Law Project, et al. in opposition filed.
Aug 24 2009	Reply of petitioners Eric H. Holder, Jr., Attorney General, et al. filed.
Sep 9 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 30 2009	Petition GRANTED The petition for a writ of certiorari in No. 09-89 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Oct 23 2009	Motion to amend the briefing schedule filed by the parties. VIDED.
Nov 2 2009	Motion to amend the briefing schedule GRANTED Petitioners in No. 09-89 will file an opening brief, not to exceed 18,000 words, on or before November 16, 2009. Petitioners in No. 08-1498 will file a response brief, not to exceed 18,000 words, on or before December 22, 2009. Petitioners in No. 09-89 will file a reply brief, not to exceed 12,000 words, on or before January 21, 2010. Petitioners in No. 08-1498 will file a reply brief, not to exceed 12,000 words, on or before February 12, 2010.
Nov 2 2009	Amicus curiae briefs in support of petitioners in No. 09-89 or in support of neither party are to be filed on or before November 23, 2009. Amicus curiae briefs in support of petitioners in No. 08-1498 are to be filed on or before December 29, 2009. VIDED.
Nov 16 2009	Joint appendix filed. VIDED.
Nov 16 2009	Brief of Humanitarian Law Project, et al. filed. VIDED.
Nov 18 2009	Consent to the filing of amicus briefs, in support of either partyor of neither party, received from counsel for Humanitarian Law Project, et al. VIDED.
Nov 19 2009	Consent to the filing of amiucs briefs, in support of either party or of neither party, received from counsel for Holder, et al. VIDED.
Nov 23 2009	Brief amicus curiae of Anti-Defamation League in support of Eric H. Holder, Jr., Attorney General, et al. filed.

Nov 23 2009	Brief amici curiae of Academic Researchers, et al. in support of Humanitarian Law Project, et al. filed. VIDED.
Nov 23 2009	Brief amici curiae of Constitution Project and the Rutherford Institute in support of Humanitarian Law Project, et al. filed. VIDED.
Nov 23 2009	Brief amici curiae of Victims of the McCarthy Era in support of Humanitarian Law Project, et al. filed. VIDED.
Nov 23 2009	Brief amici curiae of Carter Center, et al. in support of Humanitarian Law Project, et al. filed. VIDED.
Nov 30 2009	SET FOR ARGUMENT ON Tuesday, February 23, 2010.
Dec 7 2009	CIRCULATED.
Dec 22 2009	Brief of Eric H. Holder, Jr., Attorney General, et al. filed. VIDED. (Distributed).
Dec 23 2009	Brief amici curiae of Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues in support of Eric H. Holder, Jr., Attorney General, et al. filed. (Distributed) VIDED.
Dec 28 2009	Brief amicus curiae of Center on the Administration of Criminal Law in support of Eric H. Holder, Jr., Attorney General, et al., filed. VIDED. (Distributed)
Dec 29 2009	Brief amici curiae of John D. Altenburg, Maj. Gen., U.S. Army (Ret.), et al. in support of petitioners Eric H. Holder, Jr., Attorney General, et al., filed. VIDED. (Distributed)
Dec 29 2009	Brief amici curiae of Center for Constitutional Jurisprudence, et al. in support of Eric Holder, Jr., Attorney General, et al. filed. VIDED.
Dec 31 2009	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jan 5 2010	Record received from U.S.D.c. for Central District of California. (1 box)
Jan 21 2010	Reply of respondents Humanitarian Law Project, et al. filed. VIDED. (Distributed)
Feb 12 2010	Application (09A738) to extend the time to file a reply brief from February 12, 2010 to February 16, 2010, submitted to Justice Kennedy.
Feb 12 2010	Application (09A738) granted by Justice Kennedy extending the time to file until February 16, 2010.
Feb 16 2010	Reply of petitioners Eric H. Holder, Jr., Attorney General, et al. filed. VIDED. (Distributed)
Feb 23 2010	Argued. For Humanitarian Law Project, et al.: David D. Cole, Washington, D. C. For Eric H. Holder, Jr., Attorney General, et al.: Elena Kagan, Solicitor General, Department of Justice, Washington, D. C.

PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

081498 JUN 4 - 2009

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, [or] expert advice or assistance," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.

PARTIES TO THE PROCEEDING

The petitioners are Eric H. Holder, Jr., Attorney General; the United States Department of Justice; Hillary Rodham Clinton, Secretary of State; and the United States Department of State.

The respondents are Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangram; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangrams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions involved 2

Statement 2

Reasons for granting the petition 9

- A. This Court's review is warranted because the court of appeals invalidated an important Act of Congress 10
- B. The court of appeals erred in holding the material-support statute unconstitutionally vague 13
  - 1. The terms "training," "expert advice or assistance," and "service" are not vague 13
  - 2. The court of appeals confused the vagueness and overbreadth doctrines 18
  - 3. The material-support statute does not violate the First Amendment 19

Conclusion 24

Appendix A – Court of appeals opinion (Dec. 10, 2007) . . . 1a

Appendix B – District court order (July 25, 2005) 33a

Appendix C – Statutory provisions 77a

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 10

Ashwander v. *TVA*, 297 U.S. 288 (1936) 22

Blodgett v. *Holden*, 275 U.S. 142 (1927) 10

Boim v. *Holy Land Found. for Relief & Dev.*,
549 F.3d 685 (7th Cir. 2008), petition for
cert. pending, No. 08-1441 (filed May 1, 2009) 12

Cases—Continued: Page

California Teachers Ass'n v. *State Bd. of Educ.*,
  271 F.3d 1141 (9th Cir. 2001) 14

Circuit City Stores, Inc. v. *Adams*, 532 U.S.
  105 (2001) 17

Daubert v. *Merrell Dow Pharms. Inc.*, 509 U.S.
  579 (1993) 16

Foti v. *City of Menlo Park*, 146 F.3d 629 (9th Cir.
  1998) 13

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 13, 19

Humanitarian Law Project v. *Ashcroft*:
  532 U.S. 904 (2001) 6
  309 F. Supp. 2d 1185 (C.D. Cal. 2004) 7

Humanitarian Law Project v. *Gonzales*,
  No. 04-55871 (9th Cir. Apr. 1, 2005) 7

Humanitarian Law Project v. *Reno*:
  9 F. Supp. 2d 1176 (C.D. Cal. 1998) 4, 6
  9 F. Supp. 2d 1205 (C.D. Cal. 1998) 6
  205 F.3d 1130 (9th Cir. 2000), cert. denied,
    532 U.S. 904 (2001) 6, 19
  No. CV-98-1971ABC, 2001 WL 36105333 (C.D. Cal.
    Oct. 2, 2001) 6

Humanitarian Law Project v. *United States Dep't of Justice*:
    352 F.3d 382 (9th Cir. 2003) 7
    393 F.3d 902 (9th Cir. 2004) 7

Jones v. *United States*, 526 U.S. 227 (1999) 22

Kumho Tire Co. v. *Carmichael*, 526 U.S. 137
  (1999) 15, 16, 17

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 19

Cases—Continued: Page

People's Mojahedin Org. of Iran v. *Department of State*, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000) 4, 5

Pierce v. *Underwood*, 487 U.S. 552 (1988) 15

Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 13

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 10

Third Nat'l Bank v. *Impac Ltd.*, 432 U.S. 312 (1977) 17

United States v. *Hammoud*, 381 F.3d 316 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005) 20

United States v. *Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70 (2d Cir.), cert. denied, 479 U.S. 1018 (1986) 18

United States v. *Homa Int'l Trading Corp.*, 387 F.3d 144 (2d Cir. 2004) 17

United States v. *Morrison*, 529 U.S. 598 (2000) 10

United States v. *O'Brien*, 391 U.S. 367 (1968) 19

United States v. *Williams*, 128 S. Ct. 1830 (2008) 10, 21

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 14

Virginia v. *Hicks*, 539 U.S. 113 (2003) 19, 21

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 13

Constitution, statutes and rule:

U.S. Const.:

Amend. I . . . . *passim*

Amend. V (Due Process Clause) 2, 19, 10, 13, 14

Statutes and rule—Continued: Page

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
  § 301(a)(1), 110 Stat. 1247 (18 U.S.C. 2339B note) 12
  § 301(a)(7), 110 Stat. 1247 (18 U.S.C. 2339B note) 12
Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762 . . . 3
8 U.S.C. 1182(a)(3)(B) 2
8 U.S.C. 1189(a)(1) 2, 12
8 U.S.C. 1189(a)(6)(A) 5
8 U.S.C. 1189(c) 3
18 U.S.C. 1346 18
18 U.S.C. 2339A(b)(1) 3, 10, 13, 22
18 U.S.C. 2339A(b)(2) 3, 15
18 U.S.C. 2339A(b)(3) 3, 8, 15
18 U.S.C. 2339B 3, 11, 19, 22, 23
18 U.S.C. 2339B(a)(1) 3, 14, 22
18 U.S.C. 2339B(h) 4, 9
18 U.S.C. 2339B(i) 23
Fed. R. of Evid. 702 . . . . 8, 15, 16

Miscellaneous:

H.R. Rep. No. 383, 104th Cong., 1st Sess. (1995) 12
Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years*, N.Y. Times, May 18, 2009, at A1 5
Webster's Third New International Dictionary of the English Language (1993) 14, 15, 17, 22

In the Supreme Court of the United States

No.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Eric H. Holder, Jr., Attorney General, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (App., *infra*, 33a-76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1176, and 9 F. Supp. 2d 1205.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (App., *infra*, 3a). On March 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 5, 2009. On April 22, 2009, Justice Kennedy further extended the time to June 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 77a-81a.

STATEMENT

1. This case involves a constitutional challenge to key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that aid America in its fight against terrorism. The statute authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate an entity as a "foreign terrorist organization" if she finds (1) that "the organization is a foreign organization"; (2) that "the organization engages in terrorist activity," as defined in 8 U.S.C. 1182(a)(3)(B); and (3) that the organization's terrorist activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). An organization may seek judicial

review of its designation by filing a petition for review in the District of Columbia Circuit. 8 U.S.C. 1189(c).

It is a criminal offense for any person within the United States or subject to its jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. 2339B(a)(1). The statute defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include onself), and transportation, except medicine or religious materials.

18 U.S.C. 2339A(b)(1).

In the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, Congress clarified several provisions of Section 2339B, the material-support statute. In particular, IRTPA defined the term "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). Finally, IRTPA specified:

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization

> with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. 2339B(h).

2. The Secretary of State has designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (Tamil Tigers or LTTE) as foreign terrorist organizations. The PKK has not sought judicial review of its designation. See *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998). The LTTE sought judicial review, but the District of Columbia Circuit upheld its designation. See *People's Mojahedin Org. of Iran* v. *United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).

a. The PKK was founded in 1974 for the purpose of establishing an independent Kurdish state in southeastern Turkey. C.A. E.R. 20. Since its inception, the organization has waged a violent insurgency that has claimed over 22,000 lives. *Ibid.* In the 1990s, the PKK conducted terrorist attacks on Turkish targets throughout Western Europe; it also targeted areas of Turkey frequented by tourists. *Id.* at 20-21. For instance, in 1996, PKK members hijacked a bus in Turkey and kidnapped two passengers, one of whom was a United States citizen. *Id.* at 21. Earlier, the PKK claimed responsibility for a series of bombings in Istanbul that killed two people and wounded at least ten others, including a United

States citizen. *Ibid.* In 1993, the PKK firebombed five sites in London. *Id.* at 22. In a separate incident that year, it kidnapped tourists from the United States and New Zealand and held them hostage. *Ibid.*

b. The Tamil Tigers were founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. C.A. E.R. 22. The organization has used suicide bombings and political assassinations in its campaign for independence, killing hundreds of civilians in the process. *Id.* at 22-25; see *People's Mojahedin Org. of Iran*, 182 F.3d at 19-20. In 1996, the Tamil Tigers exploded a truck bomb at the Central Bank in Colombo, Sri Lanka, killing 100 people and injuring more than 1400. C.A. E.R. 23. The following year, the group exploded another truck bomb near the World Trade Center in central Colombo, injuring 100 people, including 7 United States citizens. *Ibid.* In 1998, a Tamil Tiger suicide bomber exploded a car bomb in Maradana, Sri Lanka, killing 37 people and injuring more than 238 others. *Id.* at 22. In addition, throughout the 1990s, the Tamil Tigers carried out several attacks on Sri Lankan government officials, killing the President, the Security Minister, and the Deputy Defense Minister. *Id.* at 24.[1]

---

[1] Sri Lankan forces recently recaptured the remaining portions of Sri Lankan territory that had been held by the LTTE. See Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years*, N.Y. Times, May 18, 2009, at A1. That development does not moot this case, because it does not eliminate the possibility that elements of the LTTE could continue to operate. The Secretary of State may revoke her designation of a foreign terrorist organization "at any time" if she finds that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation," 8 U.S.C. 1189(a)(6)(A), but she has not taken such an action with respect to the LTTE. In any event, respondents have asserted that they wish to aid both the LTTE and the PKK, and the district court's order applies

3. Respondents are two United States citizens and five domestic organizations who wish to provide money and other support for what they say are lawful, nonviolent activities of the PKK and the Tamil Tigers. They brought two separate actions, eventually consolidated in the district court, challenging the constitutionality of the material-support statute.

a. In the first action, respondents raised several constitutional challenges to the statute, including the assertion that the terms "training" and "personnel" are unconstitutionally vague. The district court rejected all of respondents' constitutional arguments except for the vagueness challenge, and it entered a preliminary injunction barring the enforcement of the challenged provisions against respondents with respect to the PKK and the LTTE. *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), and 9 F. Supp. 2d 1205 (C.D. Cal. 1998). The court of appeals affirmed the preliminary injunction on the same ground. *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1137-1138 (9th Cir. 2000). Respondents petitioned for a writ of certiorari, seeking review of the rejection of their other constitutional claims, but this Court denied the petition. *Humanitarian Law Project* v. *Ashcroft*, 532 U.S. 904 (2001).

On remand, the district court permanently enjoined enforcement of the challenged provisions against respondents, again on vagueness grounds. *Humanitarian Law Project* v. *Reno*, No. CV-98-1971ABC, 2001 WL 36105333 (C.D. Cal. Oct. 2, 2001). A panel of the court of appeals affirmed that judgment as well. *Humanitarian*

---

equally to the two groups. App., *infra*, 75a-76a. There is unquestionably still a live controversy concerning the constitutionality of the statute as applied to the PKK.

Law Project v. *United States Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003). After the IRTPA amendments became law, however, the court granted the government's petition for rehearing en banc, vacated the panel's decision in relevant part, and remanded to the district court to consider the case in light of those amendments. *Humanitarian Law Project* v. *United States Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc).

b. In the second action, respondents focused on the term "expert advice or assistance," asserting that it too is unconstitutionally vague. The district court agreed and enjoined the government from enforcing the challenged provision against respondents with respect to the PKK and the LTTE. *Humanitarian Law Project* v. *Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The court of appeals subsequently vacated and remanded that judgment for consideration of the IRTPA amendments. *Humanitarian Law Project* v. *Gonzales*, No. 04-55871 (9th Cir. Apr. 1, 2005).

c. Both remanded cases were consolidated before the district court, where respondents asserted that the terms "training," "personnel," and "expert advice or assistance" are unconstitutionally vague, even as amended and clarified by IRTPA. Respondents also argued that the term "service"—which IRTPA had added to the definition of "material support or resources"—is impermissibly vague. The district court agreed with those claims, except as to "personnel," and it again entered an injunction. App., *infra*, 33a-76a.

4. The court of appeals affirmed. App., *infra*, 1a-32a.

The court of appeals held that the term "training" is unconstitutionally vague. App., *infra*, 20a-23a. The court considered it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for [humanitarian] aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. In addition, "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" the court stated that "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a. The court concluded that the term "training" is vague "because it 'implicates, and potentially chills, [respondents'] protected expressive activities.'" *Id.* at 22a-23a (quoting *id.* at 64a).

The court of appeals also held that the term "expert advice or assistance" is unconstitutionally vague. App., *infra*, 23a-24a. The court noted that the statute's definition of "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), was borrowed from Federal Rule of Evidence 702. But that borrowing, the court stated, "does not clarify the term 'expert advice or assistance' for the average person with no background in law." App., *infra*, 24a (quoting *id.* at 66a). In particular, the court concluded that "the 'other specialized knowledge' portion of the ban" would "cover constitutionally protected advocacy." *Ibid.* By contrast, the court held that the provision was not vague insofar as it reached "scientific [or] technical * * * knowledge," because "the meaning of 'technical' and 'scientific' is reasonably understandable to a person of ordinary intelligence." *Ibid.*

Similarly, the court of appeals held that the term "service" is vague "because it is easy to imagine protected expression that falls within the bounds of the term service,'" and because "each of the other challenged provisions could be construed as a provision of 'service.'" App., *infra*, 25a (internal quotation marks omitted).

Finally, the court of appeals held that the term "personnel" is not vague. App., *infra*, 26a-27a. The court noted that, as a result of IRTPA, the statute "criminalizes providing 'personnel' to a foreign terrorist organization only where a person, alone or with others, '[work]s under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization.'" *Id.* at 26a (brackets in original) (quoting 18 U.S.C. 2339B(h)). As amended, the court held, the term is not vague because it "no longer criminalizes pure speech protected by the First Amendment." *Id.* at 26a-27a.

5. The court of appeals denied a petition for rehearing en banc. App., *infra*, 3a.

REASONS FOR GRANTING THE PETITION

The court of appeals declared parts of an Act of Congress unconstitutionally vague under the Fifth Amendment. Such a decision would ordinarily warrant this Court's review. That is especially so in this case, because the statute in question, which prohibits the knowing provision of material support to designated foreign terrorist organizations, is a vital part of the Nation's effort to fight international terrorism.

The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. That is incorrect. Each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Because the statute provides fair notice of what is prohibited, it satisfies the requirements of the Due Process Clause.

The court of appeals believed that the terms at issue are vague primarily because they could be construed to prohibit speech that is protected by the First Amendment. That conclusion rests on a confusion between the vagueness and overbreadth doctrines. The breadth of a statute, by itself, has nothing to do with whether the statute is vague. In any event, the statute in question regulates conduct, not speech, and does not violate the First Amendment in any of its applications. To the extent that there is any doubt about the statute's applicability to constitutionally protected advocacy, the court of appeals could have construed the statute to avoid any constitutional infirmity, and erred in failing to do so.

A. This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Important Act Of Congress

This Court should grant review because the court of appeals held that portions of an Act of Congress are unconstitutional. App., *infra*, 20a-25a (concluding that the terms "training," "expert advice or assistance," and "service" in 18 U.S.C. 2339A(b)(1) are unconstitutionally vague). As this Court has repeatedly observed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The Court has frequently reviewed lower-court decisions holding a federal law unconstitutional, even in the absence of a circuit conflict. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000).

This Court's review is particularly appropriate in this case because the material-support statute is an important tool in the Nation's fight against international terrorism. Since 2001, the United States has charged approximately 120 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and approximately 60 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance, or "service"—the parts of the statute struck down by the court of appeals in this case. See, *e.g.*, Indictment at 4-5, *United States* v. *Iqbal*, No. 06-Cr-1054 (RMB) (S.D.N.Y. filed Jan. 20, 2007) (defendants were charged under Section 2339B with providing satellite-television services to Hizballah; defendants pleaded guilty); Indictment at 1-2, *United States* v. *Shah*, No. 05-Cr-673 (LAP) (S.D.N.Y. filed Dec. 6, 2006) (defendants were charged under Section 2339B with providing al Qaeda "martial arts training and instruction" and "medical support to wounded jihadists"; one defendant pleaded guilty and the other was found guilty after a jury trial). And several of the cases have involved the provision of material support to the LTTE, one of the terrorist organizations at issue here. See, *e.g.*, *United States* v. *Osman*, No. 06-cr-00416-CCB-1 (D. Md.); *United States* v. *Sarachandran*, No. 06-cr-00615-RJD-1 (E.D.N.Y.); *United States* v. *Thavaraja*, No. 06-cr-00616-RJD-JO-1 (E.D.N.Y.). Many of those prosecutions potentially prevented substantial harm to the Nation.

When it enacted the material-support statute, Congress expressly found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(1) and (7), 110 Stat. 1247 (18 U.S.C. 2339B note) (emphasis added). "[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to [a terrorist] organization" to "defray the cost to the terrorist organization of running * * * ostensibly legitimate activities," their contribution "frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995); see *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), petition for cert. pending, No. 08-1441 (filed May 1, 2009). Accordingly, Congress has banned a broad range of material support—regardless of whether the terrorist group claims to engage in otherwise lawful activities, and regardless of whether the support is ostensibly given to assist those supposedly lawful activities.

The decision below seriously undermines the statutory scheme created by Congress to address the problem of international terrorism. Under the injunction affirmed by the court of appeals, respondents are free to provide "training," "expert advice or assistance," and "service"—of whatever kind—to the PKK and the LTTE, organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1); see App., *infra*, 75a-76a. That result warrants correction by this Court.

B. The Court of Appeals Erred In Holding The Material-Support Statute Unconstitutionally Vague

1. The terms "training," "expert advice or assistance," and "service" are not vague

The Due Process Clause requires that a criminal statute be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Clause does not require that an offense be defined with "mathematical certainty," *id.* at 110, but only that it give "relatively clear guidelines as to prohibited conduct," *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994). The statutory definition of "material support" in 18 U.S.C. 2339A(b)(1) easily satisfies that standard.

The court of appeals believed that, because "First Amendment freedoms" are at issue in this case, the government "may regulate * * * only with narrow specificity." App., *infra*, 20a (quoting *Foti* v. *City of Menlo Park*, 146 F.3d 629, 638-639 (9th Cir. 1998)). That is incorrect. As explained below, see pp. 19-21, *infra*, the material-support statute does not regulate speech; it is a regulation of conduct that only incidentally impinges on expression. In any event, this Court has observed that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989).

Moreover, the court of appeals failed to appreciate that Section 2339B is violated only when the person providing material support *knows* that the organization being supported is a designated terrorist organization or has engaged in terrorism or terrorist activity. 18 U.S.C.

2339B(a)(1). That scienter requirement helps to mitigate any potential vagueness problem by reducing the possibility that the statute could be applied to innocent conduct. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982).

The court of appeals identified three components of the definition of material support that it considered vague: "training," "expert advice or assistance," and "service." App., *infra*, 20a-25a. In fact, each of those terms is sufficiently clear to satisfy the Due Process Clause.

a. Even before Congress clarified the definition of "training" by enacting IRTPA in 2004, the meaning of that term was clear and readily intelligible to the average person. "Train" is defined as "to teach or exercise (someone) in an art, profession, trade, or occupation," to "direct in attaining a skill," or to "give instruction to." *Webster's Third New International Dictionary of the English Language* 2424 (1993) (*Webster's*). As the court of appeals recognized in an earlier case, a person of ordinary intelligence would readily understand those concepts. See *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (holding that "instruction" is a "word[] of common understanding" and is not unconstitutionally vague). Indeed, "training" is sufficiently intelligible that respondents used the term in their complaints to describe their own activities. C.A. E.R. 11-12 (alleging that respondents "would like to * * * provide the PKK * * * with training"); *id.* at 44 (same). The clarity of the statute as applied to respondents' own conduct is fatal to their claim of vagueness. See *Village of Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

IRPTA further clarifies the meaning of "training" by providing that it includes only "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Contrary to the court of appeals' conclusion, App., *infra*, 21a-22a, that definition is clear on its face: a person of ordinary intelligence is capable of distinguishing between what is commonly or generally known and what is not. See *Pierce* v. *Underwood*, 487 U.S. 552, 572 (1988) (distinguishing "some distinctive knowledge or specialized [litigation] skill" from "general lawyerly knowledge").

b. Likewise, the phrase "expert advice or assistance" has a clearly understood meaning and is not vague. See *Webster's* 800 (defining "expert" as "having special skill or knowledge derived from training or experience"). Again, respondents themselves have used the term in describing their activities. See, *e.g.*, C.A. E.R. 42 (alleging that some respondents "have devoted a substantial amount of time and resources to * * * providing training, expert advice and other forms of support to the PKK"); *id.* at 45 (alleging that other respondents "wish to offer their expert medical advice and assistance to the LTTE"); *id.* at 46-47.

The clarity of "expert advice or assistance" has only been enhanced by IRTPA, which further defines it to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). That definition is derived from Federal Rule of Evidence 702, which permits expert witnesses to offer testimony based on "scientific, technical, or other specialized knowledge." This Court explained in *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), that the category of scientific, technical, and other specialized knowledge consists of "specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case" that is based upon experiences "foreign in kind" to those of the population in general. *Id.* at 149. Once again, a person of ordinary intelligence could readily distinguish between common knowledge and knowledge that is so specialized that it is foreign to the experiences of most people.

The court of appeals believed that the origins of the phrase "expert advice or assistance" in Rule 702 did not clarify the statute "for the average person with no background in law." App., *infra*, 24a (quoting *id.* at 66a). But this Court's interpretation of Rule 702 has been based on the ordinary meaning of the rule's words, not on obscure legal arcana. See *Daubert* v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-590 (1993) (citing dictionary definitions of "scientific" and "knowledge"). The average person need not know anything about Rule 702 or about the relationship between Rule 702 and the phrase "expert advice or assistance" in order to understand the meaning of that term.[2]

The analysis of the court of appeals is particularly puzzling because the court held that part of the phrase —namely, "scientific [or] technical * * * knowledge" —is *not* vague, while "other specialized knowledge" is vague. App., *infra*, 24a. But under the principle of *ejusdem generis*, "other specialized knowledge" takes its meaning from the surrounding (concededly non-vague) terms "scientific" and "technical." See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (citation omitted). Indeed, "the average person with no background in law," App., *infra*, 24a, would not need to be familiar with "such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach [the] obvious conclusion" that "words grouped in a list should be given related meaning," *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322-323 & n.16 (1977) (quotation marks omitted). Moreover, *Kumho Tire* makes clear that the entire phrase—"scientific, technical, or other specialized knowledge"—refers to knowledge based on experiences not usually shared by the general public. 526 U.S. at 148-149. That understanding of all the parts of the definition of "expert advice or assistance" taken together is just what a person of ordinary intelligence would take the words to mean.

---

[2] In any event, the court of appeals' criticism rests on a misunderstanding of the vagueness standard. Many terms in criminal statutes, such as "malice aforethought" or "conspiracy," are not clear as a matter of ordinary English but are nevertheless sufficiently definite to be enforceable because they have specialized meanings in the law.

c. The term "service" is also not unconstitutionally vague. "Service" refers to "an act done for the benefit or at the command of another" or to "useful labor that does not produce a tangible commodity." *Webster's* 2075. Those words are readily understood by people of ordinary intelligence. In other contexts, courts of appeals have found the same or similar terms to be sufficiently clear to define the scope of criminal liability. See, *e.g.*, *United States* v. *Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (concluding that "[t]he term 'services,'" as used in a statute and Executive Order prohibiting the export of "services" to Iran, is "unambiguous"); *United States* v. *Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 77 (2d Cir.) (rejecting vagueness challenge to a provision of an Executive Order prohibiting any person from engaging in any "service contract" in Iran, because the language in the Executive Order "gave * * * fair notice" of what was prohibited), cert. denied, 479 U.S. 1018 (1986). The word is no less easy to understand in the material-support statute.

2. *The court of appeals confused the vagueness and overbreadth doctrines*

The decision of the court of appeals rested in large part on the court's view that prohibiting the provision of any "training," "expert advice or assistance," or "service" to a terrorist group would violate the First Amendment. For example, the court reasoned that "training" is vague because it could "be read to encompass speech and advocacy protected by the First Amendment." App., *infra*, 22a; see *id.* at 24a (holding that "expert advice or assistance" is vague because it "continues to cover constitutionally protected advocacy"); *id.* at 25a (holding that "service" is vague "because it is easy to imagine protected expression that falls within the bounds of the term 'service'") (internal quotation marks omitted).

The court of appeals' analysis erroneously conflated the doctrines of vagueness and overbreadth. If the court were correct that "training" could "be read to encompass speech and advocacy protected by the First Amendment," App., *infra*, 22a, then the statute might be unconstitutional, as a matter of substantive First Amendment law, in some of its applications. And if those applications were sufficiently numerous in relation to the legitimate applications of the statute, then the statute would be vulnerable to an overbreadth challenge. See *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). But overbreadth and vagueness are distinct doctrines, and the coverage of a statute, by itself, has nothing to do with whether its meaning is unclear. See *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (That a statute can be applied in many different situations "does not demonstrate ambiguity. It demonstrates breadth.") (quotation marks omitted); *Grayned*, 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). Assuming arguendo that this statute has unconstitutional applications to protected First Amendment activity, that does not render the statute unconstitutionally vague.

3. The material-support statute does not violate the First Amendment

Even if the breadth of Section 2339B were somehow relevant to a vagueness inquiry, the decision below would still be incorrect. Contrary to the view of the court of appeals, the statute does not restrict speech that is protected by the First Amendment.

a. Section 2339B is not aimed at speech. Instead, the statute is a regulation of conduct that, as the court below has previously recognized, serves a purpose unrelated to the content of any expression: "stopping aid to terrorist groups." App., *infra*, 28a (quoting *Humanitarian Law Project*, 205 F.3d at 1135). And as a regulation of conduct that only incidentally restricts speech, Section 2339B easily survives review under the longstanding test set out in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)—*i.e.*, that the regulation be within the government's power; that it promote an important interest; that the interest be unrelated to suppressing free expression; and that the regulation restrict First Amendment rights no more than is necessary. As the court of appeals observed, the statute is within the Federal Government's authority to regulate the dealings of its citizens with foreign entities; it promotes an essential government interest "in preventing the spread of international terrorism"; it is aimed at stopping aid to terrorist groups rather than at suppressing expression; and it is reasonably tailored, especially considering the "wide latitude" given to the government in an area "bound up with foreign policy considerations" and considering Congress's conclusion that designated terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Humanitarian Law Project*, 205 F.3d at 1136 (internal quotation marks omitted); accord *United States* v. *Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) ("Section 2339B satisfies all four prongs of the *O'Brien* test."), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005).

The same analysis applies whether the material support takes the form of conduct or words, because the statute does not regulate the content of any expression, but only the act of knowingly giving material support. Nor does it matter, when the support takes the form of words, whether those words are intrinsically blameworthy (*e.g.*, training on how to build a bomb) or seemingly benign (*e.g.*, advice on international law, or on how to program a computer). In either instance, the statute's aim is not directed at the content of speech, but at the act of aiding deadly terrorist organizations. Accordingly, the prohibition does not contravene the First

Amendment, as applied to plaintiffs' conduct or otherwise.

b. Because the statute does not violate the First Amendment in any of its applications, it follows *a fortiori* that it is not overbroad. To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. *Hicks*, 539 U.S. at 119-120; see *Williams*, 128 S. Ct. at 1838. Even if respondents could show some cases in which the statute would ban protected speech, those instances would not be "substantial" in absolute number, nor would they be "substantial" in relation to the numerous legitimate applications of the statute, such as prohibiting a person from training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money. See *Hicks*, 539 U.S. at 124 ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."). Thus, as even the court below recognized in another part of its analysis, the statute is not overbroad. App., *infra*, 27a-29a.

c. The court of appeals drew a distinction between material support in the form of independent advocacy (which it held could not be prohibited consistent with the First Amendment), and material support provided directly to, or under the control of, a terrorist group (which can permissibly be banned). App., *infra*, 26a-27a. But the court failed to appreciate that the challenged terms—"training," "expert advice or assistance," and "service"—can easily be construed so as not to prohibit any independent advocacy, and thus so as not to offend the First Amendment even under the court of appeals' theory. The court of appeals was obliged to adopt such a construction if necessary to save the statute, and it erred by failing to do so. See *Jones* v. *United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal quotation marks omitted); *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

All the terms at issue here imply a relationship to another person or entity. The ordinary meaning of "service," for example, is "an act done * * * at the command of another." *Webster's* 2075. One does not "serve" in the abstract; one serves someone or something. Similarly, "training," "advice," and "assistance" all assume an object—the person to whom or entity to which the training, advice, and assistance are rendered—and some collaboration or other relationship between the giver and the recipient of the type of aid in question. The terms are therefore naturally read, even if not inevitably read, to exclude independent advocacy.

Other parts of Section 2339B also support this interpretation. The key provision of the statute criminalizes only support provided "*to*" a foreign terrorist organization, 18 U.S.C. 2339A(b)(1), 2339B(a)(1) (emphasis added), which suggests that it prohibits only support that is given directly to a terrorist group or provided with some significant level of collaboration. A person who acts independently to advocate for a terrorist group would not commonly be considered to have knowingly provided something "to" that terrorist organization; if independent support were covered, Congress would have prohibited support "of" or "for" a terrorist group. And the scienter requirement ensures that the individual must knowingly provide support to an organization he or she knows is involved with terrorism, again implying a relationship other than independence between the two. See pp. 13-14, *supra*.

Accordingly, to the extent that Section 2339B's constitutionality turns on ensuring that its prohibitions do not bar independent advocacy, the statute can easily be construed in such a fashion. And a court would be obliged to adopt that construction if necessary to save the statute, not only under general principles of constitutional avoidance, but also under Congress's specific instruction that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. 2339B(i). The court of appeals, however, made no attempt to adopt a saving construction. Its failure to do so is another error warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

JUNE 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56753

HUMANITARIAN LAW PROJECT; RALPH FERTIG;
ILANKAI THAMIL SANGRAM; TAMILS OF NORTHERN
CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS
COMMITTEE; FEDERATION OF TAMIL SANGRAMS OF
NORTH AMERICA; WORLD TAMIL COORDINATING
COMMITTEE; NAGALINGAM JEYALINGAM, DR.,
PLAINTIFFS-APPELLEES

v.

MICHAEL B. MUKASEY,[*] ATTORNEY GENERAL, OF THE
UNITED STATES; UNITED STATES DEPARTMENT OF
JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE;
UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLANTS

---

[*] Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

No. 05-56846

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGRAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGRAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM, DR., PLAINTIFFS-APPELLANTS

v.

MICHAEL B. MUKASEY,* ATTORNEY GENERAL, OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

Filed: Dec. 10, 2007
Amended: Jan. 5, 2009

Before: HARRY PREGERSON, SIDNEY R. THOMAS, and JOHNNIE B. RAWLINSON, Circuit Judges.

ORDER

The opinion filed in this case on December 10, 2007, slip op. at 16135, 509 F.3d 1122 is hereby amended as follows:

At slip op. 16157, line 12: 509 F.3d at 1134, at the end of the paragraph, add the following footnote:

> The issue of a facial vagueness challenge is not before this court. We therefore do not reach that issue.

At slip op. 16160, line 10: 509 F.3d at 1136, at the end of the paragraph, add the following footnote:

> Whether the outcome would be different if evidence were presented showing that "service" rendered to a designated foreign terrorist organization resulted in the receipt of money by the designated foreign terrorist organization itself is not an issue presented by this case. We therefore do not reach that issue.

With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of these amendments and of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.) Future petitions for panel rehearing and future petitions for rehearing en banc will not be entertained.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

OPINION

PREGERSON, Circuit Judge:

We are once again called upon to decide the constitutionality of sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and its 2004 amendment, the Intelligence Reform and Terrorism Prevention Act ("IRTPA").

I. OVERVIEW

Section 302(a) of AEDPA, Pub. L. 104-132, 110 Stat. 1214 (1996), codified in 8 U.S.C. § 1189, authorizes the Secretary of State (the "Secretary") to designate a group as a "foreign terrorist organization." Section

303(a) makes it a crime for anyone to provide support to even the nonviolent activities of the designated organization. *See* 18 U.S.C. § 2339B(a). Specifically, 8 U.S.C. § 1189(a)(1) authorizes the Secretary of State

> to designate an organization as a foreign terrorist organization . . . if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189(a)(1).

The pertinent facts may be found in prior published decisions in this case. *See Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir. 2000) ("*HLP I*"), cert. denied, 532 U.S. 904, 121 S. Ct. 1226, 149 L. Ed. 2d 136 (2001); *see also Humanitarian Law Project v. United States Dep't of Justice,* 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated,* 393 F.3d 902 (9th Cir. 2004). We, therefore, set forth only a brief overview of the facts of this case.

Plaintiffs are six organizations, a retired federal administrative law judge, and a surgeon. The Kurdistan Workers Party, a.k.a Partiya Karkeran Kurdistan ("PKK"), and the Liberation Tigers of Tamil Eelam ("LTTE") engage in a wide variety of unlawful and lawful activities. Plaintiffs seek to provide support only to nonviolent and lawful activities of PKK and LTTE. This support would help Kurds living in Turkey and Tamils living in Tamil Eelam in the Northern and Eastern provinces of Sri Lanka to achieve self-determination.[1]

On October 8, 1997, the Secretary of State designated PKK, LTTE, and twenty-eight other foreign organizations as "foreign terrorist organizations." *See* 62 Fed. Reg. 52,650, 52,650-51 (Oct. 8, 1997). To this day, both PKK and LTTE remain on the designated foreign terrorist organization list. Plaintiffs, fearing that they would be criminally investigated, prosecuted, and convicted under section 2339B(a), have been withholding their support for the PKK and LTTE from the time they were designated as foreign terrorist organizations.

On March 19, 1998, Plaintiffs filed a complaint in the district court (CV-98-01971-ABC; appeal No. 05-56753), alleging that AEDPA violated their First and Fifth Amendment rights. Plaintiffs sought a preliminary injunction to bar the government from enforcing against them AEDPA's prohibition against providing "material support or resources" to PKK and LTTE. In support of their motion for a preliminary injunction, Plaintiffs argued: (1) that AEDPA violated their First Amendment right to freedom of association and their Fifth Amendment right to due process because section 2339B(a) imposed a criminal penalty for their association with the designated organizations without requiring the government to prove that Plaintiffs had the specific intent to further the designated organizations' unlawful goals; (2) that AEDPA violated their First Amendment right to association by prohibiting them from making political contributions to the designated organizations; and (3) that AEDPA violated their First and Fifth Amendment rights because it gave the Secretary of State unfettered licensing power to designate a group as a foreign terrorist organization.

---

[1] Plaintiffs who support PKK want: (1) to train members of PKK on how to use humanitarian and international law to peacefully resolve disputes, (2) to engage in political advocacy on behalf of Kurds who live in Turkey, and (3) to teach PKK members how to petition various representative bodies such as the United Nations for relief.

Plaintiffs who support LTTE want: (1) to train members of LTTE to present claims for tsunami-related aid to mediators and international bodies, (2) to offer their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and (3) to engage in political advocacy on behalf of Tamils who live in Sri Lanka.

In June 1998, the district court partially granted Plaintiffs' motion for a preliminary injunction and enjoined the Attorney General's enforcement of AEDPA with respect to its prohibition on providing "training" and "personnel" to PKK and LTTE. *See Humanitarian Law Project v. Reno,* 9 F. Supp. 2d 1205, 1215 (C.D. Cal. 1998) ("*DC-HLP I*"). The district court held that "Plaintiffs have demonstrated a probability of success on their claim that the terms 'personnel' and 'training' are impermissibly vague." *Id.* The district court rejected the remainder of Plaintiffs' challenges, holding that AEDPA's prohibition on providing "material support or resources" to designated foreign terrorist organizations is a "content-neutral limitation on Plaintiffs' right to freedom of association" and "is subject to an intermediate scrutiny level of review." *Id.* at 1212. The district court also held that "AEDPA does not impose 'guilt by association alone' in violation of the First Amendment because the AEDPA only limits the permissible *ways* in which Plaintiffs can associate with PKK and LTTE." *Id.* (emphasis in the original). In other words, the district court held that AEDPA does not criminalize mere membership. Rather, AEDPA criminalizes conduct that provides "material support or resources" to a designated foreign terrorist organization. Finally, the district court held that Plaintiffs failed to establish a probability of success on their claim that AEDPA affords the Secretary of State unfettered discretion to designate a group as a foreign terrorist organization. *See id.* at 1213.

Both parties appealed the district court's order. On March 3, 2000, we affirmed the district court. *See HLP I.* In *HLP I,* we determined that AEDPA section 2339B is a content-neutral regulation of conduct subject to intermediate scrutiny. *See id.* at 1135. Further, we rejected Plaintiffs's licensing scheme argument and held that the discretion accorded to the Secretary of State to designate a group as a foreign terrorist organization is not "unfettered" "because the regulation involves the conduct of foreign affairs" for which the courts "owe the executive branch even more latitude." *Id.* at 1137. Finally, we agreed with Plaintiffs that AEDPA's prohibitions on providing "personnel" and "training" to designated foreign terrorist organizations were unconstitutionally vague because these prohibitions could be read to criminalize conduct protected by the First Amendment. *See id.* at 1137-38.

After the case went back to the district court, the government moved to dismiss and both parties sought summary judgment in their favor. The district court reaffirmed its prior decision in an unpublished order. *See Humanitarian Law Project v. Reno,* No. CV 98-01971 ABC, 2001 WL 36105333, 2001 U.S. Dist. LEXIS 16729 (C.D. Cal. Oct. 3, 2001). The district court entered a permanent injunction against enforcing AEDPA's prohibition on providing "personnel" and "training" to designated organizations. *See id.* 2001 WL 36105333 at *12-13, 2001 U.S. Dist. LEXIS 16729 at *38.

Both parties appealed. On appeal, in addition to renewing previously raised arguments, Plaintiffs also raised a Fifth Amendment due process challenge, arguing that AEDPA section 2339B imposes vicarious liability because it does not contain a mens rea element.

On October 26, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272 (Oct. 26, 2001). The USA PATRIOT Act amended AEDPA's definition of "material support or resources" to include the prohibition against providing "expert advice or assistance" to a designated foreign terrorist organization. *See* 18 U.S.C. § 2339A(b) and § 2339B(g)(4).

On August 27, 2003, Plaintiffs filed a separate complaint in the district court (CV-03-06107-ABC; appeal No. 05-56846), challenging AEDPA's ban on providing "expert advice or assistance" to a designated foreign terrorist organization. The district court found that term to be unconstitutionally vague, but not overbroad. *See Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The district court granted Plaintiffs's request for injunctive relief. *See id.* at 1204. Both parties appealed.

On December 3, 2003, we affirmed the district court's holding that the terms "training" and "personnel" were void for vagueness. *See Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated*, 393 F.3d 902 (9th Cir. 2004). A majority of the panel also read into the statute a mens rea requirement holding that, "to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." *Id.* at 403. The parties sought, and we granted, en banc review of *HLP II*. *See Humanitarian Law Project v. United States Dep't of Justice*, 382 F.3d 1154 (9th Cir. 2004).

On December 17, 2004, three days after the en banc panel heard oral argument, Congress passed the Intelligence Reform and Terrorism Prevention Act ("IRTPA") which amended AEDPA. As amended, AEDPA now provides in part:

> Whoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1) (emphasis added).

> The term "material support or resources" includes:
>
> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training*, *expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b) (emphasis added).

In enacting IRTPA, Congress amended the definition of "material support or resources" to include an additional ban on providing "service." *See id*. Congress also defined for the first time the terms "training" and "expert advice or assistance," 18 U.S.C. § 2339(A)(b)(2)-(3), and clarified the prohibition against providing "personnel" to designated organizations, 18 U.S.C. § 2339B(h).

Post-IRTPA, "training" refers to "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). "Expert advice or assistance" encompasses "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). "Personnel" includes "1 or more individuals" who "work under th[e] terrorist organization's direction or control or [who] organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). AEDPA, as amended by IRTPA, narrows the definition of "personnel" by providing that "[i]ndividuals who act *entirely independently* of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control." *Id*. (emphasis added).

Further, IRTPA provides that AEDPA's prohibition on providing "material support or resources" to a designated foreign terrorist organization includes a mens rea requirement. To violate the statute, a person who provides "material support or resources" to a designated organization must *know* that (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or that (3) "the organization has engaged or engages in terrorism."[2] 18 U.S.C. § 2339B(a)(1).

Lastly, AEDPA, as amended by IRTPA, gives the Secretary of State discretion to authorize (with the concurrence of the Attorney General) certain forms of support[3] otherwise proscribed under section 2339B(a) unless such support "may be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

Because of the amendments to AEDPA contained in IRTPA, the en banc panel, on December 21, 2004, "vacate[d] the judgment and injunction [of the *HLP II* panel] regarding the terms 'personnel' and 'training,' and remanded [this case] to the district court for further proceedings." *See Humanitarian Law Project v. United States Dep't of State*, 393 F.3d 902, 902 (9th Cir. 2004) ("*HLP en banc*"). The en banc panel also affirmed the district court's rulings on the rest of Plaintiffs' First Amendment challenges "for the reasons set out in [*HLP I*]," and vacated the decision in *HLP II*. *Id*. On April 1, 2005, we remanded Plaintiffs' separate challenge to the term "expert advice or assistance" to the district court to consider IRTPA's impact on the litigation.

---

[2] This language essentially adopts our holding in HLP II, where we held that "to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." *HLP II*, 352 F.3d at 403.

[3] Section 2339B(j) allows the Secretary of State to exempt from prosecution persons who may otherwise be held liable for providing "training," "expert advice or assistance," and "personnel." 18 U.S.C. § 2339B(j).

On remand, the district court consolidated the two cases (the "personnel" and "training" challenge and the "expert advice and assistance" challenge). Plaintiffs also challenge IRTPA's newly added term "service." The parties thereafter filed cross-motions for summary judgment. On July 25, 2005, the district court granted in part and denied in part the summary judgment motions in the consolidated cases. *See Humanitarian Law Project v. Gonzales,* 380 F. Supp. 2d 1134 (C.D. Cal. 2005) ("*DC-HLP III*"). The district court held that the terms "training" and "service" are unconstitutionally vague. *Id.* at 1152. With respect to the term "expert advice or assistance," the district court held that the "other specialized knowledge" part of the definition is void for vagueness, but that the "scientific" and "technical" knowledge part of the definition was not vague. *Id.* at 1151 & n.23. The district court also held that the newly-added definition of "personnel" found in AEDPA section 2339B(h) cured the vagueness of that term. *Id.* at 1152. The district court rejected the rest of Plaintiffs' challenges and granted partial summary judgment for the government. *See id.* at 1155. Both parties timely appealed.

II. STANDARD OF REVIEW

We review the district court's order granting summary judgment de novo. *See Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact. *See id.*

The district court's determination that a statute is unconstitutionally vague is reviewed de novo. *See United States v. Wyatt,* 408 F.3d 1257, 1260 (9th Cir. 2005).

III. DISCUSSION

A. Specific Intent

In their prior appeals, Plaintiffs argued that AEDPA section 2339B(a) violates their Fifth Amendment due process rights because that section does not require proof of mens rea to convict a person for providing "material support or resources" to a designated foreign terrorist organization. *See HLP-II,* 352 F.3d at 394. In *HLP-II,* we read the statute to require that the donor of the "material support or resources" have knowledge "either of an organization's designation or of the unlawful activities that caused it to be so designated." *Id.* at 402-03.

In December 2004, Congress passed IRTPA that revised AEDPA to essentially adopt our reading of AEDPA section 2339B to include a knowledge requirement. Thus, post-IRTPA, to convict a person for providing "material support or resources" to a designated foreign terrorist organization, the government must prove that the donor defendant "ha[d] knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a) (citations omitted). As explained above, on December 21, 2004, the en banc panel vacated our judgment in *HLP II,* and remanded the case to the district court for further proceedings in light of IRTPA. *See HLP en banc,* 393 F.3d 902. The district court's decision on remand is now the matter before us.

Plaintiffs argue that IRTPA does not sufficiently cure AEDPA section 2339B's *mens rea* deficiency. They contend that section 2339B(a) continues to violate due process because it does not require the government to prove that the donor defendant acted with specific intent to further the terrorist activity of the designated organization. Plaintiffs urge us to invalidate the statute or, alternatively, to read a specific intent requirement into the statute.

"In our jurisprudence guilt is personal." *Brown v. United States*, 334 F.2d 488, 495 (9th Cir. 1964) (internal quotations and citation omitted). Thus, we must "construe [a criminal] statute in light of the fundamental principle that a person is not criminally responsible unless 'an evil-meaning mind' accompanies 'an evil-doing hand.'" *United States v. Nguyen*, 73 F.3d 887, 890 (9th Cir. 1995) (quoting *Morissette v. United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952)). In other words, unless Congress expressly communicates its intent to dispense with a mens rea requirement and create strict criminal liability, the notion of "personal guilt" requires some culpable intent before criminal liability attaches.

"[D]etermining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (quoting *United States v. Balint*, 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922)). We remain mindful that we "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette,* 342 U.S. at 263, 72 S. Ct. 240.

In *Liparota v. United States,* 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), the Supreme Court examined the constitutionality of a federal statute that criminalized the acquisition or possession of food stamps in any unauthorized manner. *See id.* at 420-21, 105 S. Ct. 2084. The statute contained no explicit *mens rea* requirement. The Court read into the statute the requirement that the government prove that "the defendant *knew* his conduct to be unauthorized by statute or regulations." *Id.* at 425-26, 105 S. Ct. 2084 (emphasis added) (noting that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").[4]

Here, AEDPA section 2339B(a) already requires the government to prove that the donor defendant provided "material support or resources" to a designated foreign terrorist organization with *knowledge* that the donee organization is a designated foreign terrorist organization, or with *knowledge* that the organization is or has engaged in terrorist activities or terrorism. 18 U.S.C. § 2339B(a). As amended, AEDPA section 2339B(a) complies with the "conventional requirement for criminal conduct—awareness of some wrongdoing." *Staples,* 511 U.S. at 606-07, 114 S. Ct. 1793. Thus, a person with such knowledge is put on notice that "providing material support or resources" to a designated foreign terrorist organization is unlawful. Accordingly, we hold that the amended version of section 2339B comports with the Fifth Amendment's requirement of "personal guilt."

---

[4] The other two cases Plaintiffs rely on, *Staples,* 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608, and *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), also involved statutes that did not contain an explicit mens rea requirement. In *Staples,* the Supreme Court interpreted the statute punishing possession of an unregistered machine gun to require knowledge that the gun he or she possessed is unregistered. *See Staples,* 511 U.S. at 619, 114 S. Ct. 1793. Similarly, in *X-Citement Video,* the Court interpreted the term "knowingly" to require that defendant knew that the persons appearing in a sexually explicit video were minors. *See X-Citement Video,* 513 U.S. at 78, 115 S. Ct. 464. However, as in *Liparota,* the Court required that, in the absence of a specific mens rea requirement, the government prove the defendant acted *knowingly.*

Plaintiffs urge us to read a specific intent requirement into AEDPA section 2339B. They rely on *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961). In *Scales,* the Supreme Court held that it was wrong to impute criminal guilt based on membership in an organization without proof that the defendant acted with culpable intent. *See id.* at 224-25, 81 S. Ct. 1469. As amended, section 2339B(a) does not proscribe membership in or association with the terrorist organizations,[5] but seeks to punish only those who have provided "material support or resources" to a foreign terrorist organization with *knowledge* that the organization was a designated foreign terrorist organization, or that it is or has engaged in terrorist activities or terrorism. Accordingly, unlike the statute in *Scales* which was silent with respect to requisite mens rea, section 2339B(a) exposes one to criminal liability only where the government proves that the donor defendant acted with culpable intent—knowledge.

---

[5] Although section 2339B(a) does not punish mere membership, the statute does prohibit the paying of membership dues. *See HLP I,* 205 F.3d at 1134 (rejecting Plaintiffs' argument that "the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds[ ]").

At oral argument, Plaintiffs conceded that, were we to read into section 2339B a specific intent requirement that the person providing "material support or resources" do so with an intent to further the organization's unlawful goals (terrorist activity), we would be extending *Scales*. Because we find that acting with "knowledge" satisfies the requirement of "personal guilt" and eliminates any due process concerns, we decline Plaintiffs' invitation to extend the holding in *Scales*.

Plaintiffs also rely on what they consider "vicarious criminal liability" cases where courts required proof of intent to further the group's illegal ends. Those cases are distinguishable. We disagree with Plaintiffs' characterization of section 2339B(a) as a statute that imposes "vicarious criminal liability."

Vicarious liability involves holding one person accountable for the actions of another. Section 2339B(a) criminalizes the act of knowingly providing "material support or resources" to a designated foreign terrorist organization. Donor defendants are penalized for the criminal act of support. Donor defendants cannot be penalized under section 2339B(a) for the illegal conduct of the donee organization.

Ferguson v. Estelle, 718 F.2d 730 (5th Cir. 1983), is instructive. In *Ferguson*, defendants, participants in a violent riot, were prosecuted for arson committed by other rioters. *See id.* at 731-32. The court held that the state (Texas) could prosecute the defendants for arson even though they were not the arsonists. *See id.* at 731. The court noted that the statute at issue conformed with *Scales*'s requirement of personal guilt because, to obtain a conviction, the state had to prove that the accused riot participants had specific intent to further the illegal aims of the rioters who committed arson. *Id.* at 736.

Unlike the statute at issue in *Ferguson*, section 2339B(a) seeks to punish only those who commit the acts proscribed by the statute. In other words, a person who provides "material support or resources" to a designated foreign terrorist organization is liable for knowingly doing so in violation of section 2339B(a). Section 2339B(a) does not impose "vicarious criminal liability" because the statute cannot be invoked to punish the donor defendant for crimes committed by the donee foreign terrorist organization. A person cannot be convicted of murder under section 2339B(a) if the foreign terrorist organization committed an act of terrorism that took innocent lives. In sum, because section 2339B(a) does not impose "vicarious criminal liability," due process is satisfied without proof of specific intent to further the organization's illegal goals.

Finally, in enacting IRTPA, Congress explicitly stated that knowledge of the organization's designation as a foreign terrorist organization, or knowledge of its engagement in terrorist activities or terrorism is required to convict under section 2339B(a). As the district court correctly observed, Congress could have, but chose not to, impose a requirement that the defendant act with the specific intent to further the terrorist activity of the organization, a requirement clearly set forth in sections 2339A and 2339C of the statute, but left out of section 2339B. *See DC HLP III*, 380 F. Supp. 2d at 1146. Moreover, it is not our role to rewrite a statute, and we decline to do so here. *See HLP I*, 205 F.3d at 1137-38.

Because there is no Fifth Amendment due process violation, we affirm the district court on this issue.

B. Vagueness

AEDPA section 2339B(a), as amended by IRTPA in December 2004, now criminalizes the act of knowingly providing "material support or resources" to a designated foreign terrorist organization. The amended statute defines "material support and resources" as:

> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b) (emphasis added).

Plaintiffs argue that this amended definition is impermissibly vague because the statute fails to notify a person of ordinary intelligence as to what conduct constitutes "material support or resources." Specifically, Plaintiffs argue that the prohibitions on providing "training," "expert advice or assistance," "service," and "personnel" to designated organizations are vague because they are unclear and could be interpreted to criminalize protected speech and expression.

The Due Process Clause of the Fifth Amendment requires that statutes clearly delineate the conduct they proscribe. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). While due process does not "require 'impossible standards' of clarity," *Kolender v. Lawson,* 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the "requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abut[s] upon sensitive areas of basic First Amendment freedoms," *Info. Providers' Coal. for the Def. of the First Amendment v. FCC,* 928 F.2d 866, 874 (9th Cir. 1991) (alteration in original) (internal quotation marks omitted). In such cases, the statute "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *HLP I,* 205 F.3d at 1137 (quoting *Foti,* 146 F.3d at 638) (internal quotation marks omitted). Moreover, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Foti,* 146 F.3d at 638-39 (internal quotation marks omitted).

Vague statutes are invalidated for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Id.* at 638.

1. "Training"

In *HLP I*, we held that the term "training" under AEDPA was unconstitutionally vague. 205 F.3d at 1138. At the time of Plaintiffs' initial challenge in 1998, AEDPA provided no definition of the term "training." After we issued our opinion in *HLP I* in 2000, Congress amended the statute and defined the term "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). On remand, Plaintiffs argued to the district court that the term "training" as defined by IRTPA remains unconstitutionally vague. Plaintiffs contended that persons of ordinary intelligence must discern whether the topic they wish to teach to members of designated organizations amounts to "teaching designed to impart a specific skill," which is criminalized, or "general knowledge," which is not. Specifically, Plaintiffs contended that they must guess whether training PKK members in how to use humanitarian and international human rights law to seek peaceful resolution of ongoing conflict amounts to teaching a "specific skill" or "general[ized] knowledge."

The district court again agreed with Plaintiffs. The district court held that IRTPA did not cure the vagueness of the term "training," and enjoined the government from enforcing against Plaintiffs AEDPA's ban on providing "training." *See DC-HLP III*, 380 F. Supp. 2d at 1150, 1156. We agree.

Generally, we would start our vagueness analysis by considering the plain meaning of the language at issue. *See Johnson v. Aljian*, 490 F.3d 778, 780 (9th Cir. 2007). However, where Congress expressly defines a term, the definition provided by Congress guides our vagueness analysis. *See United States v. Rowland*, 464 F.3d 899, 905 (9th Cir. 2006).

To survive a vagueness challenge, the statute must be sufficiently clear to put a person of ordinary intelligence on notice that his or her contemplated conduct is unlawful. *See Foti*, 146 F.3d at 638. Because we find it highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami related aid, one is imparting a "specific skill" or "general knowledge," we find the statute's proscription on providing "training" void for vagueness. *See HLP I*, 205 F.3d at 1138 (finding the term "training" impermissibly vague because "a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term 'training.'"); *see also Info. Providers' Coalition*, 928 F.2d at 874.[6]

Even if persons of ordinary intelligence could discern between the instruction that imparts a "specific skill," as opposed to one that imparts "general knowledge," we hold that the term "training" would remain impermissibly vague. As we previously noted in *HLP I*, limiting the definition of the term "training" to the "imparting of skills" does not cure unconstitutional vagueness because, so defined, the term "training" could still be read to encompass speech and advocacy protected by the First Amendment. *See HLP I*, 205 F.3d at 1138 (finding "training" void for vagueness because "it is easy to imagine protected expression that falls within the bounds of this term").[7]

For the foregoing reasons, we reject the government's challenge and agree with the district court that the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand." *DC-HLP III,* 380 F. Supp. 2d at 1150 (citing *Info. Providers' Coalition,* 928 F.2d at 874).

---

[6] The issue of a facial vagueness challenge is not before this court. We therefore do not reach that issue.

[7] In deciding previously raised challenges such as vagueness, we are bound by our decision in *HLP I*. *See Murdoch v. Castro*, 489 F.3d 1063, 1067 (9th Cir. 2007) (" '[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' ").

2. "*Expert Advice or Assistance*"

The district court previously invalidated the undefined term "expert advice or assistance" on vagueness grounds. The district court reasoned that the prohibition against providing "expert advice or assistance" could be construed to criminalize activities protected by the First Amendment. *Id.* at 1151. The government appealed. We now have the benefit of IRTPA's language while reviewing this appeal.

IRTPA defines the term "expert advice or assistance" as imparting "scientific, technical, or other specialized knowledge." 18 U.S.C. § 2339A(b)(3).

The government argues that the ban on "expert advice or assistance" is not vague. The government relies on the Federal Rules of Evidence's definition of expert testimony as testimony based on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589-91, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The government argues that this definition gives a person of ordinary intelligence reasonable notice of conduct prohibited under the statute. Plaintiffs contend that the definition of "expert advice or assistance" is vague as applied to them because they cannot determine what "other specialized knowledge" means.

We agree with the district court that "the Federal Rules of Evidence's inclusion of the phrase 'scientific, technical, or other specialized knowledge' does not clarify the term 'expert advice or assistance' for the average person with no background in law." *DC-HLP III,* 380 F. Supp. 2d at 1151.

At oral argument, the government stated that filing an amicus brief in support of a foreign terrorist organization would violate AEDPA's prohibition against providing "expert advice or assistance." Because the "other specialized knowledge" portion of the ban on providing "expert advice or assistance" continues to cover constitutionally protected advocacy, we hold that it is void for vagueness. *See HLP I,* 205 F.3d at 1137-38; *NAACP v. Button,* 371 U.S. 415, 432-33, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (noting that vagueness and overbreadth depend on "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application").

The portion of the "expert advice or assistance" definition that refers to "scientific" and "technical" knowledge is not vague. Unlike "other specialized knowledge," which covers every conceivable subject, the meaning of "technical" and "scientific" is reasonably understandable to a person of ordinary intelligence. *See* Houghton Mifflin Reading Spelling and Vocabulary Word Lists (5th Grade), http://www-kes.stjohns.k12.fl.us/wordlists/5th/vocab2.htm (including "technical" as a fifth-grade vocabulary word); *see also* Tennessee Department of Education Third Grade Science Vocabulary, http://jc-schools.net/tutorials/vocab/sci-3.htm (including "scientific method" on third-grade vocabulary list).

3. "Service"

IRTPA amended the definition of "material support or resources" to add the prohibition on rendering "service" to a designated foreign terrorist organization. There is no statutory definition of the term "service."

Plaintiffs argue that proscribing "service" is vague because each of the other challenged provisions could be construed as a provision of "service." The district court agreed.

We adopt the district court's holding and its reasoning. *See DC-HLP III,* 380 F. Supp. 2d at 1151-52. The term "service" presumably includes providing members of PKK and LTTE with "expert advice or assistance" on how to lobby or petition representative bodies such as the United Nations. "Service" would also include "training" members of PKK or LTTE on how to use humanitarian and international law to peacefully resolve ongoing disputes. Thus, we hold that the term "service" is impermissibly vague because "the statute defines 'service' to include 'training' or 'expert advice or assistance,'" and because "'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'" *Id.* at 1152.[8]

---

[8] Whether the outcome would be different if evidence were presented showing that "service" rendered to a designated foreign terrorist organization resulted in the receipt of money by the designated foreign terrorist organization itself is not an issue presented by this case. We therefore do not reach that issue.

4. *"Personnel"*

In *HLP I*, we concluded that "personnel" was impermissibly vague because the term could be interpreted to encompass expressive activity protected by the First Amendment. *HLP I*, 205 F.3d at 1137. We stated that, "[i]t is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term 'personnel,' as it blurs the line between protected expression and unprotected conduct." *Id.* We observed that "[s]omeone who advocates the cause of the PKK could be seen as supplying them with personnel. . . . But advocacy is pure speech protected by the First Amendment." *Id.*

As stated above, in 2004, Congress passed IRTPA which amended AEDPA. IRTPA added a limitation to the ban on providing "personnel." 18 U.S.C. § 2339B(h). Section 2339B(h) clarifies that section 2339B(a) criminalizes providing "personnel" to a foreign terrorist organization only where a person, alone or with others, "[work]s under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization." Section 2339B(h) also states that the ban on "personnel" does not criminalize the conduct of "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." *Id.*

As amended by IRTPA, AEDPA's prohibition on providing "personnel" is not vague because the ban no longer "blurs the line between protected expression and unprotected conduct." *HLP I*, 205 F.3d at 1137. Unlike the version of the statute before it was amended by IRTPA, the prohibition on "personnel" no longer criminalizes pure speech protected by the First Amendment. Section 2339B(h) clarifies that Plaintiffs advocating lawful causes of PKK and LTTE cannot be held liable for providing these organizations with "personnel" as long as they engage in such advocacy "entirely independently of th[ose] foreign terrorist organization[s]." 18 U.S.C. § 2339B(h).

Because IRTPA's definition of "personnel" provides fair notice of prohibited conduct to a person of ordinary intelligence and no longer punishes protected speech, we hold that the term "personnel" as defined in IRTPA is not vague.

C. Overbreadth

Plaintiffs argue that the terms "training," "personnel," "expert advice or assistance" and "service" are substantially overbroad. The district court rejected Plaintiffs' challenge. *See DC-HLP III*, 380 F. Supp. 2d at 1152-53. We affirm.

A statute is facially overbroad when its application to protected speech is "substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119-20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (internal quotation marks and citations omitted). The Supreme Court held in *Hicks* that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." *Id.* at 124, 123 S. Ct. 2191. The Court reasoned that the "concern with chilling protected speech attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct." *Id.* (internal quotation marks and citations omitted).

We have previously held that AEDPA's prohibition against providing "material support or resources" to a designated organization "is not aimed at interfering with the expressive component of [Plaintiffs'] conduct but at stopping aid to terrorist groups." *HLP I,* 205 F.3d at 1135. Thus, because the statute is not aimed primarily at speech, an overbreadth challenge is more difficult to show. However, we still conduct the *Hicks* analysis. That is, we decide whether the material support statute's application to protected speech is substantial when compared to the scope of the law's plainly legitimate applications. *See Hicks,* 539 U.S. at 118-19, 123 S. Ct. 2191.

Section 2339B(a)'s ban on provision of "material support or resources" to designated foreign terrorist organizations undoubtably has many legitimate applications. For instance, the importance of curbing terrorism cannot be underestimated. Cutting off "material support or resources" from terrorist organizations deprives them of means with which to carry out acts of terrorism and potentially leads to their demise. Thus, section 2339B(a) can legitimately be applied to criminalize facilitation of terrorism in the form of providing foreign terrorist organizations with income, weapons, or expertise in constructing explosive devices. *See HLP I,* 205 F.3d at 1133.

The Supreme Court cautioned in *Hicks* that "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Hicks,* 539 U.S. at 119, 123 S. Ct. 2191. Were we to restrain the government from enforcing section 2339B(a) that prohibits individuals in the United States from providing "material support or resources" to foreign terrorist organizations, we would potentially be placing our nation in danger of future terrorist attacks.

Moreover, although Plaintiffs may be able to identify particular instances of protected speech that may fall within the statute, those instances are not substantial when compared to the legitimate applications of section 2339B(a).

Thus, because AEDPA section 2339B is not aimed at expressive conduct and because it does not cover a substantial amount of protected speech, we hold that the prohibition against providing "material support or resources' to a foreign terrorist organization is not facially overbroad.

D. Licensing Scheme

IRTPA added section 2339B(j), an entirely new section, to AEDPA. Section 2339B(j) allows the Secretary of State, with the concurrence of the Attorney General, to grant approval for individuals and organizations to carry out activities that would otherwise be considered providing "material support or resources" to designated foreign terrorist organizations. 18 U.S.C. § 2339B(j). Section 2339B(j) states that no one can be prosecuted under the terms "'personnel,' 'training,' or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General." 18 U.S.C. 2339B(j). The exception limits the scope of discretion by providing only that the "Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity." *Id.*

Plaintiffs argue that this provision constitutes an unconstitutional licensing scheme. We disagree.

Courts may entertain pre-enforcement facial challenges to a licensing scheme where the law has a "close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). A licensing scheme is facially invalid if the "licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speaker." *Id.* The relevant censorship risks include "self-censorship by speakers in order to avoid being denied a license to speak" and the "difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.*

In our first decision, we rejected Plaintiffs' challenge to the licensing scheme in another portion of AEDPA that allows the Secretary of State to designate a group as a foreign terrorist organization. *See HLP I*, 205 F.3d at 1136-37. We held that the Secretary of State's discretion to designate a group as a foreign terrorist organization was not unconstitutional. *See id.* We reasoned that "AEDPA does not regulate speech or association per se. Rather, the restriction is on the act of giving material support to designated foreign organizations." *Id.* at 1136-37. We reach the same conclusion here.

Section 2339B(j) gives the Secretary of State the discretion to approve the provision of "material support or resources." It does not regulate speech per se. Rather, the statute permits the Secretary of State to authorize the otherwise prohibited provision of "material support or resources" to a designated foreign terrorist organization. Indeed, we clarified in *HLP I* that contributions of "material support or resources" to foreign entities designated as foreign terrorist organizations should *not* be equated with political expression and association itself, even if such organizations are engaged in political expression. *See HLP I,* 205 F.3d at 1134-35 (contrasting the *Buckley* doctrine, where monetary support is a proxy for speech and is therefore a constitutionally protected activity). Thus, we hold that the discretion given to the Secretary poses no "real and substantial threat" to Plaintiffs' protected expression or their expressive conduct. *See City of Lakewood,* 486 U.S. at 759, 108 S. Ct. 2138.

We recognize that it is possible for the Secretary to exercise his or her discretion in a way that discriminates against the donor of "material support or assistance." For example, the Secretary could conceivably exempt from prosecution a person who teaches peacemaking skills to members of Hezbollah, but deny Plaintiffs immunity from prosecution if they teach the same peacemaking skills to PKK. However, when evaluating the constitutionality of a licensing scheme, we look at how closely the prior restraint, *on its face,* regulates constitutionally protected activity. Here, even though it is possible for the Secretary to refuse to exercise his or her discretion to exempt from prosecution a disliked speaker, any such power is incidental. The statute does not give the Secretary "*substantial* power to discriminate based on the content or viewpoint of speech" or the identity of the speaker. *Id.* (emphasis added).

Moreover, in Plaintiffs' case, any potential for content or viewpoint-based discrimination or discrimination based on the identity of the speaker is significantly reduced because the government is enjoined from enforcing those provisions of the statute we hold vague. Thus, because Plaintiffs are already immune from prosecution for protected speech, the danger that the Secretary can base his or her exercise of discretion on Plaintiffs' identity or the content or viewpoint of Plaintiffs' message is almost non-existent.

Accordingly, we affirm the district court's holding that section 2339B(j) does not have a close enough nexus to protected speech to allow a facial challenge.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Nos. CV98-1971ABCRCX,
CV03-6107ABCRCX

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

ALBERTO GONZALES, ET AL., DEFENDANTS

July 25, 2005

ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

COLLINS, District Judge.

This action involves a challenge to portions of the Antiterrorism and Effective Death Penalty Act and the Intelligence Reform and Terrorism Prevention Act. Specifically, the parties seek summary judgment regarding the constitutionality of the prohibition on providing material support or resources, including "training." "expert advice or assistance," "personnel," and "service," to designated foreign terrorist organizations.

The Humanitarian Law Project, Ralph Fertig, Ilankai Thamil Sangam, Dr. Nagalingam Jeyalingam, World

Tamil Coordinating Committee, Federation of Tamil Sangams of North America, and Tamil Welfare and Human Rights Committee (collectively, "Plaintiffs") desire to provide support for the lawful activities of two organizations that have been designated as foreign terrorist organizations. Plaintiffs seek summary judgment and an injunction to prohibit the enforcement of the criminal ban on providing material support to such organizations. Alberto Gonzales (in his official capacity as United States Attorney General), the United States Department of Justice, Condoleeza Rice (in her official capacity as Secretary of the Department of State), and the United States Department of State (collectively, "Defendants") bring a motion to dismiss and cross-motion for summary judgment. After considering the parties' submissions, the arguments of counsel, and the case file, the Court hereby DENIES Defendants' motion to dismiss and GRANTS IN PART and DENIES IN PART the parties' cross-motions for summary judgment.

I. FACTUAL BACKGROUND

The background of this case is well known to the parties and to the Court and need not be recited at length here. Plaintiffs are five organizations and two United States citizens seeking to provide support to the lawful, nonviolent activities of the Partiya Karkeran Kurdistan (Kurdistan Workers' Party) ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). The PKK and the LTTE have been designated as foreign terrorist organizations.

The PKK is a political organization representing the interests of the Kurds in Turkey, with the goal of achieving self-determination for the Kurds in Southeastern Turkey. Plaintiffs allege that the Turkish government has subjected the Kurds to human rights abuses and discrimination for decades. The PKK's efforts on behalf of the Kurds include political organizing and advocacy, providing social services and humanitarian aid to Kurdish refugees, and engaging in military combat with Turkish armed forces.

Plaintiffs wish to support the PKK's lawful and nonviolent activities towards achieving self-determination. Specifically, Plaintiffs seek to provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.

The LTTE represents the interests of Tamils in Sri Lanka, with the goal of achieving self-determination for the Tamil residents of Tamil Eelam in the Northern and Eastern provinces of Sri Lanka. Plaintiffs allege that the Tamils constitute an ethnic group that has for decades been subjected to human rights abuses and discriminatory treatment by the Sinhalese, who have governed Sri Lanka since the nation gained its independence in 1948. The LTTE's activities include political organizing and advocacy, providing social services and humanitarian aid, defending the Tamil people from human rights abuses, and using military force against the government of Sri Lanka.

Plaintiffs wish to support the LTTE's lawful and nonviolent activities towards furthering the human rights and well-being of Tamils in Sri Lanka. In particular, Plaintiffs emphasize the desperately increased need for aid following the tsunamis that devastated the Sri Lanka region in December 2004, especially in Tamil areas along the Northeast Coast. Plaintiffs seek to provide training in the presentation of claims to mediators and international bodies for tsunami-related aid, offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and engage in political advocacy on behalf of Tamils living in Sri Lanka.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (the "AEDPA") proscribing all material support and resources to designated foreign terrorist organizations in the interests of law enforcement and national security. Specifically, the AEDPA sought to prevent the United States from becoming a base for terrorist fundraising. Congress recognized that terrorist groups are often structured to include political or humanitarian components in addition to terrorist components. Such an organizational structure allows terrorist groups to raise funds under the guise of political or humanitarian causes. Those funds can then be diverted to terrorist activities.

Following the September 11, 2001 terrorist attacks on the World Trade Center Twin Towers in New York, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA PATRIOT Act") and the Intelligence Reform and Terrorism Prevention Act (the "IRTPA") in 2001 and 2004, respectively, to further its goal of eliminating material support or resources to foreign terrorist organizations. The USA PATRIOT Act and the IRTPA amended the AEDPA.

While Plaintiffs are committed to providing the above-mentioned support, they fear doing so would expose them to criminal prosecution under the AEDPA for providing material support and resources to foreign terrorist organizations. Accordingly, Plaintiffs challenge the portion of the AEDPA, as amended by the IRTPA, providing as follows:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a).

The AEDPA, as amended by the USA PATRIOT Act and the IRTPA, defines "material support or resources" as:

> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1) (emphasis added).

II. PROCEDURAL BACKGROUND

The procedural history of the cases before the Court is somewhat complex.

A. Case No. 98-1971

Plaintiffs first filed a complaint on March 19, 1998 in Case No. 98-1971, in which they alleged that the

AEDPA violated the First and Fifth Amendments. Specifically, Plaintiffs sought a preliminary injunction barring the enforcement of the AEDPA against them for three reasons: (1) the AEDPA's prohibition on providing material support to foreign terrorist organizations violated the First Amendment rights of freedom of speech and association; (2) the AEDPA unconstitutionally granted the Secretary of State unfettered discretion to designate disfavored organizations as foreign terrorist organizations; and (3) the terms "training" and "personnel" were impermissibly vague under the Fifth Amendment. The Court rejected most of Plaintiffs' arguments, instead finding that the AEDPA neither violated the First Amendment nor allowed the Secretary of State unfettered discretion to blacklist organizations. However, the Court agreed in part with Plaintiffs' arguments regarding vagueness and, therefore, preliminarily enjoined the prosecution of Plaintiffs and their members under the AEDPA's prohibition on providing "training" and "personnel" to foreign terrorist organizations. *See Humanitarian Law Project v. Reno,* 9 F. Supp. 2d 1176 (C.D. Cal. 1998) ("*District Court-HLP I*").

On March 3, 2000, the Ninth Circuit affirmed this Court's order. *See Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir. 2000) ("*HLP I*"). In response, this Court issued a permanent injunction on October 2, 2001, which the Ninth Circuit upheld on December 3, 2003. *See Humanitarian Law Project v. United States Department of Justice,* 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated,* 393 F.3d 902 (9th Cir. 2004). In addition to upholding this Court's conclusion that "training" and "personnel" are impermissibly vague, the Ninth Circuit's ruling in *HLP II* construed the AEDPA to require that the donor of material support have knowledge that the recipient either had been designated as a foreign terrorist organization or engaged in terrorist activities. Subsequently, the Ninth Circuit voted to rehear the three-judge panel's ruling in *HLP II en banc. See Humanitarian Law Project v. United States Department of State*, 382 F.3d 1154 (9th Cir. 2004).

However, on December 17, 2004, three days after oral argument before the *en banc* panel, Congress enacted the IRTPA, amending the terms "training," "personnel," "expert advice or assistance" and adding the term "service" to the definition of "material support or resources" to designated terrorist organizations. *See* 18 U.S.C. §§ 2339A(b); 2339B(h). The IRTPA also clarified a *mens rea* requirement that the donor know that the foreign terrorist organization has been designated as a foreign terrorist organization or has engaged in terrorist activities. Accordingly, the AEDPA, as amended by the IRTPA, now states: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism. . . . " 18 U.S.C. § 2339B (internal citations omitted).

Subsequently, on December 21, 2004, the Ninth Circuit *en banc* panel declined to decide *HLP II* in light of Congress's amendment of the terms at issue and adoption of a *mens rea* requirement. However, the Ninth Circuit affirmed this Court's October 2, 2001 order holding the terms "training" and "personnel" impermissibly vague for the reasons set forth in *HLP I. See Humanitarian Law Project v. United States Department of State*, 393 F.3d 902 (9th Cir. 2004). The Ninth Circuit also vacated its order in *HLP II*, in which it had previously construed the AEDPA to require knowledge that a recipient organization was either a foreign terrorist organization or had engaged in terrorist activities. The Ninth Circuit then remanded the case to this Court for further proceedings. *See id.*

B. Case No. 03-6107

On October 31, 2001, Congress enacted the USA PATRIOT Act, amending the AEDPA to add "expert advice or assistance" to the definition of "material support or resources" to designated terrorist organizations. *See* 18 U.S.C. §§ 2339A(b); 2339B(g)(4). Plaintiffs filed a second complaint in this Court on August 27, 2003, in Case No. 03-6107, in which they alleged that the prohibition on providing "expert advice and assistance" violated the First and Fifth Amendments. On March 17, 2004, this Court again rejected most of Plaintiffs' arguments. However, the Court enjoined Defendants from enforcing the "expert advice or assistance" provision against Plaintiffs, finding the term "expert advice or assistance," like "training" and "personnel," to be impermissibly vague. *See Humanitarian Law Project v. Ashcroft,* 309 F. Supp. 2d 1185 (C.D. Cal. 2004) ("*District Court-HLP II*"). Thereafter, the parties cross-appealed this Court's ruling to the Ninth Circuit. In view of the IRTPA amendments, the Ninth Circuit subsequently remanded the case to this Court to allow it to be heard with the earlier case.

C. Consolidation of Case No. 98-1971 and Case No. 03-6107

The two cases filed by Plaintiffs (the first construing "training" and "personnel" and the second construing "expert advice or assistance") were consolidated in this Court, and the parties agreed to an extended briefing schedule on the instant cross-motions. On May 16, 2005, Plaintiffs filed the instant motion for summary judgment. Defendants filed their opposition to Plaintiffs' motion for summary judgment on July 8, 2005.[1] Defendants also filed a motion to dismiss and cross-motion for summary judgment on July 8, 2005. The parties filed replies in support of their respective cross-motions on July 18, 2005 and July 20, 2005. On July 25, 2005, Defendants submitted a supplemental brief without the Court's permission regarding the vagueness challenge. Oral argument was heard on July 25, 2005.

III. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Justiciability

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts that would entitle him or her to relief. *See Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246 (9th Cir. 1997). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

Standing is a threshold requirement in every federal case. *See Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the controversy as to warrant his invocation of federal court jurisdiction." *MAI Sys. Corp. v. UIPS,* 856 F. Supp. 538, 540 (N.D. Cal. 1994) (citation omitted). Article III standing consists of "three separate but interrelated components": "(1) a distinct and palpable injury to the plaintiff; (2) a fairly traceable causal connection between the injury and challenged conduct; and (3) a substantial likelihood that the relief requested will prevent or redress the injury." *Id.* (citing *McMichael v. County of Napa,* 709 F.2d 1268, 1269 (9th Cir. 1983)).

---

[1] Defendants' opposition was originally due on June 10, 2005. Due to extenuating circumstances, the Court granted Defendants an extension of time to file their opposition on July 8, 2005.

B. Motion for Summary Judgment

Summary judgment shall be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citations omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The moving party discharges its burden by showing that the nonmoving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Natal Bank v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). The Court views the inferences drawn from the facts in the light most favorable to the party opposing the motion. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987).

When the parties file cross-motions for summary judgment, the district court must consider all of the evidence submitted in support of both motions to evaluate whether a genuine issue of material fact exists precluding summary judgment for either party. *See Fair Housing Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1135 (9th Cir. 2001).

IV. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss Plaintiffs' challenge to the terms "training," "expert advice or assistance," "personnel," and "service" "for lack of justiciability". According to Defendants, Plaintiffs lack standing to bring a vagueness challenge under the Fifth Amendment for two reasons: (1) Plaintiffs rely on speculative hypotheticals inapplicable to their own conduct; and (2) Plaintiffs conflate vagueness under the First and Fifth Amendments. Plaintiffs oppose Defendants' motion, arguing that their claims are justiciable under both the First and Fifth Amendments because they face a credible threat of prosecution for their own intended activities. The Court finds that Defendants' motion to dismiss for lack of justiciability must be DENIED.

"To satisfy the Article III case or controversy requirement, [a plaintiff] must establish, among other things, that it has suffered a constitutionally cognizable injury-in-fact." *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1093 (9th Cir. 2003). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*). Instead, there must be a "genuine threat of imminent prosecution." *Id.* "In evaluating the genuineness of a claimed threat of prosecution, [the Ninth Circuit considers] whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.*

Plaintiffs have identified more than a hypothetical intent to violate the law. In fact, Plaintiffs have provided services in the past specifically to the PKK and the LTTE and would do so again if the fear of criminal prosecution were removed. Plaintiffs' desire to provide services is heightened by the December 2004 tsunamis that impacted the Sri Lankan coast. Further, Defendants' contention that Plaintiffs lack standing to attack the AEDPA for vagueness based on mere hypothetical situations ignores the evidence that Plaintiffs submitted regarding their intended activities. Plaintiffs do not seek injunctive relief as to hypothetical activities, but as to their own.[2]

---

[2] Defendants' reliance on *Hill v. Colorado*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) as support that courts may not consider hypothetical situations in void for vagueness challenges is misplaced. In *Hill*, the Supreme Court declined to entertain hypotheticals after it had already found that the "the likelihood that anyone would not understand any of those common words [in the statute] seems quite remote." *Hill*, 530 U.S. at 733, 120 S. Ct. 2480. In contrast, the statutory language regarding the ban on "training," "expert advice or assistance," "personnel," and "service" is more ambiguous and complex.

Finally, Defendants do not contest that Plaintiffs face a threat of prosecution or that the challenged statute has been enforced in the past. Plaintiffs' intended activities arguably fall within the statute's reach, and the government has been active in its enforcement of the AEDPA. Therefore, the Court finds that Plaintiffs have sufficiently established standing to assert a vagueness challenge.[3]

---

[3] The Court also rejects Defendants' argument regarding the conflation of vagueness under the First and Fifth Amendments. Citing *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), Defendants contend that a statute must be vague in all applications in order to be held unconstitutionally vague under the Fifth Amendment. According to Defendants, Plaintiffs conflate vagueness and overbreadth by asserting vagueness as applied to the hypothetical conduct of others instead of Plaintiffs' own intended activities. The Supreme Court rejected this argument in *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Specifically, the Supreme Court stated, "First, it neglects the fact that we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct.' Second, where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application . . . " *Kolender*, 461 U.S. at 358 n. 8, 103 S. Ct. 1855 (citations omitted). The Supreme Court noted that "we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Id.* The Supreme Court further distinguished *Parker* as a case involving military regulation. *See id.* Accordingly, the Court rejects Defendants' argument that Plaintiffs' First Amendment concerns are limited to a First Amendment overbreadth attack and cannot be raised in the context of a Fifth Amendment vagueness challenge. As discussed below, Plaintiffs' Fifth Amendment vagueness challenge is intertwined with their First Amendment concerns. The legal standards applied to a vagueness challenge and an overbreadth challenge, however, differ. Accordingly, the Court addresses Plaintiffs' vagueness and overbreadth arguments separately below.

B. The Parties' Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on three grounds: (1) the prohibition on providing material support or resources to foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities violates due process under the Fifth Amendment; (2) the prohibitions on "training," "expert advice or assistance," "personnel," and "service," as amended by the IRTPA, are impermissibly vague under the Fifth Amendment; and (3) the provision exempting prosecution for providing material support to a foreign terrorist organization that has been approved by the Secretary of State is an unconstitutional licensing scheme under the First Amendment.

Defendants, in turn, seek summary judgment on three grounds: (1) the AEDPA, as amended by the IRTPA, is consistent with Congressional intent, and its *mens rea* requirement is constitutionally sufficient under the Fifth Amendment; (2) the terms "training," "expert advice or assistance," "personnel," and "service" are neither vague nor overbroad under the First and Fifth Amendments in relation to Plaintiffs' own conduct; and (3) the IRTPA amendments do not grant the government unconstitutional licensing authority.

After considering the arguments, the Court finds that the parties' cross-motions for summary judgment must be GRANTED IN PART and DENIED IN PART as follows: (1) the prohibition on providing material support to foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities does not violate due process under the Fifth Amendment; (2) the terms "training," "expert advice or assistance," and "service" are impermissibly vague; (3) the term "personnel" is not impermissibly vague; (4) the prohibitions on providing "training," "expert advice or assistance," "personnel," and "service" are not overbroad; and (5) the exemption from prosecution for providing material support that has been approved by the Secretary of State is not an unconstitutional licensing scheme under the First Amendment. The Court addresses each of these issues in turn below.

1. The Prohibition on Providing Material Support or Resources Does Not Violate the Fifth Amendment.

Citing *Scales v. United States*, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961), Plaintiffs argue that the AEDPA's prohibition on providing material support or resources to foreign terrorist organizations violates due process under the Fifth Amendment. Specifically, Plaintiffs contend that the prohibition imposes vicarious criminal liability without requiring proof of specific intent to further the terrorist activities of foreign terrorist organizations. Plaintiffs, therefore, urge the Court to read a specific intent *mens rea* requirement into 18 U.S.C. § 2339B in order to avoid Fifth Amendment due process concerns.

Defendants, in contrast, assert that the AEDPA does not impose vicarious criminal liability, but instead prohibits only the conduct of giving material support or resources to foreign terrorist organizations. Moreover, Defendants point to Congressional intent regarding the *mens rea* required and Congress's wide latitude to legislate in the foreign affairs arena. Defendants also contend that the Ninth Circuit previously rejected the specific intent argument in *HLP II*. Finally, Defendants note that the IRTPA amendment requiring that a donor know that the recipient of the material support is a foreign terrorist organization adequately addresses Plaintiffs' concerns regarding specific intent.

As further explained below, the Court finds that the AEDPA does not violate due process under the Fifth Amendment and, therefore, declines to read a specific intent requirement into the statute. First, *Scales* is inapposite, as the holding there turned on specific facts not present here. Second, the clear and unambiguous Congressional intent to exclude a specific intent requirement precludes a judicial interpretation of a specific intent element. Finally, the statute's current requirement that a donor know that the recipient of material support is a foreign terrorist organization eliminates any Fifth Amendment due process concerns.

a. *Scales* Is Distinguishable from This Case.

Plaintiffs rely primarily on *Scales v. United States*, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961), a Communist Party membership case, to support their argument that the AEDPA violates due process under the Fifth Amendment. *Scales* involved a Fifth Amendment challenge to a conviction under the Smith Act, which prohibited membership in a group advocating the overthrow of the government by force or violence, with punishment by fine or imprisonment for up to twenty years. *See Scales*, 367 U.S. at 206 n.1, 81 S. Ct. 1469; 18 U.S.C. § 2385. The defendant contended that the Smith Act violated the Fifth Amendment because it unconstitutionally imputed guilt based on associational membership rather than concrete criminal conduct. The Supreme Court agreed that "[i]n our jurisprudence guilt is personal" and that "[m]embership, without more, in an organization engaged in illegal advocacy" was insufficient to satisfy personal guilt. *Id.* at 224-25, 81 S. Ct. 1469. Nevertheless, the Supreme Court upheld the conviction because the defendant was not merely a member of the Communist Party, but had committed concrete acts with a specific intent to further the organization's illegal activities. *Id.* at 226-27, 81 S. Ct. 1469.

Plaintiffs attempt to stretch the *Scales* holding regarding the Smith Act into a general rule that specific intent is always constitutionally required. However, *Scales* was not so broad, but focused specifically on the Smith Act's criminal prohibition on *membership* in certain organizations, including the Communist Party. Indeed, membership itself was an element of the offense. While *Scales* discussed the concept of personal guilt in relation to "status or conduct," a close reading of *Scales* reveals that at heart, it was concerned with criminalizing associational membership in violation of the First Amendment.[4] By requiring specific intent in addition to actual membership, the Supreme Court sought to "prevent[ ] a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." *Scales*, 367 U.S. at 228, 81 S. Ct. 1469. In contrast, the AEDPA does not criminalize mere membership, association, or expressions of sympathy with foreign terrorist organizations.[5] Instead, the AEDPA permits membership and affiliation with foreign terrorist organizations, but prohibits the conduct of providing material support or resources to an organization that one knows is a designated foreign terrorist organization or is engaged in terrorist activities.

---

[4] In addition to *Scales*, Plaintiffs also cite two Ninth Circuit cases from the same era regarding Communist Party membership: *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961) and *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964). As with *Scales*, *Hellman* and *Brown* are distinguishable from the instant case because they involved imputed guilt based on Communist Party membership without further proof of active conduct or intent to overthrow the government.

b. Clear Congressional Intent Precludes a Judicial Reading of Specific Intent Into the AEDPA.

Plaintiffs urge the Court to read an additional *mens rea* requirement into 18 U.S.C. § 2339B to require the government to prove that a donor specifically intended to further the terrorist activities of the foreign terrorist organization.[6] Plaintiffs cite three cases in which the Supreme Court read a *mens rea* requirement into federal criminal statutes, namely, *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), *Staples v. United States*, 511 U.S. 600, 114 S. Ct.

---

[5] Both the Ninth Circuit and this Court have rejected Plaintiffs' First Amendment associational challenges to the AEDPA's criminalization of material support to foreign terrorist organizations. *See HLP I*, 205 F.3d at 1134 ("We therefore do not agree . . . that the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds."); *District Court-HLP I*, 9 F. Supp. 2d at 1191 ("AEDPA does not criminalize *mere* association with designated terrorist organizations by prohibiting the provision of material support regardless of the donor's intent. . . . "). As previously noted, Plaintiffs remain free to affiliate with and advocate on behalf of foreign terrorist organizations.

[6] The AEDPA, as amended by the IRTPA, currently reads, "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism. . . . " 18 U.S.C. § 2339B (internal citations omitted).

1793, 128 L. Ed. 2d 608 (1994), and *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). As explained below, none of these cases warrants a judicial interpretation that would contravene the clear Congressional intent to dispense with a specific intent requirement.

In *Liparota*, the Supreme Court interpreted a federal statute criminalizing the acquisition or possession of food stamps in any unauthorized manner to include a *mens rea* requirement that a defendant must know that he or she acquired or possessed food stamps in an unauthorized manner. In doing so, the Supreme Court noted that Congress has the power to define the elements of a federal statutory crime: "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota*, 471 U.S. at 424, 105 S. Ct. 2084. Finding, however, that the legislative history of the statute was silent as to a *mens rea* requirement and that criminal statutes without *mens rea* are "'generally disfavored,'" the Court concluded that it was proper to read a *mens rea* element into the statute. *Id.* at 425-26, 105 S. Ct. 2084 (quoting *United States v. Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)). In so concluding, the Supreme Court noted that its result would likely have been different if Congress had intended to omit a *mens rea* element to the offense:

> Of course, Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that

> Congress did so intend, we are reluctant to adopt such a sweeping interpretation.

Id. at 427, 105 S. Ct. 2084. Thus, the Court unequivocally recognized that Congress, as the creator of federal crimes, has the power to dispense with *mens rea*, even when doing so would criminalize a broad range of conduct.

Subsequently, in *Staples*, the Supreme Court interpreted the National Firearms Act, which criminalizes the possession of an unregistered firearm by up to ten years imprisonment, to have a *mens rea* element. *See* 26 U.S.C. § 5861(d). Specifically, the Supreme Court held that a defendant must know that the gun he or she possesses is actually a firearm in order to be convicted. *See Staples*, 511 U.S. at 619, 114 S. Ct. 1793. In construing a *mens rea* requirement, the Court drew on statutory construction and legislative intent, reiterating that "[w]e have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Id.*, at 605, 114 S. Ct. 1793 (quoting *United States v. Balint*, 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922)). As that section of the National Firearms Act was silent as to scienter, the Supreme Court construed the statute to include *mens rea*, noting that the statute's harsh penalties further supported such a reading. However, the Supreme Court emphasized that its holding was "a narrow one," dependent on the lack of Congressional intent in that case to dispense with *mens rea*. *Staples*, 511 U.S. at 619, 114 S. Ct. 1793. Moreover, the Supreme Court again reiterated that Congress had the authority to eliminate a *mens rea* requirement: "[I]f Congress thinks it necessary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend § 5861(d) by explicitly eliminating a *mens rea* requirement." *Id.* at 616 n.11, 114 S. Ct. 1793.

Several months later, in *X-Citement Video,* the Supreme Court interpreted the Protection of Children Against Sexual Exploitation Act, which prohibits the interstate transportation of visual depictions of minors engaged in sexually explicit conduct, to require that a defendant knew that the performers were minors. *See* 18 U.S.C. § 2252(a)(1)(A)-(2)(A). The Supreme Court noted that both the statutory construction and legislative history could support a scienter requirement, which would help justify the harsh penalties and avoid absurd applications of the statute.[7] *See X-Citement Video,* 513 U.S. at 69-72, 115 S. Ct. 464. In so concluding, the Supreme Court again acknowledged Congress's authority to craft statutes without a *mens rea* element, observing that courts may construe a *mens rea* requirement "*so long as* such a reading is not plainly contrary to the intent of Congress." *Id.* at 78, 115 S. Ct. 464 (emphasis added).

Accordingly, following *Liparota, Staples,* and *X-Citement Video,* the Court must analyze the statutory language and Congressional intent with respect to the

---

[7] The Court notes, however, that the Supreme Court has specifically stated that even absurd consequences resulting from an elimination of *mens rea* would not "justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so." *Morissette v. United States,* 342 U.S. 246, 256 n.14, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

AEDPA, as amended by the IRTPA.[8] The AEDPA's statutory language regarding the *mens rea* required is straightforward, namely, that a donor know that the recipient of the material support is a foreign terrorist organization or engages in terrorist activities. *See* 18 U.S.C. § 2339B.

With respect to legislative intent, moreover, Congress's intent regarding the level of *mens rea* required for violation of 18 U.S.C. § 2339B is clear and unambiguous. First, Congress enacted 18 U.S.C. § 2339B in 1996, only two years after it had enacted 18 U.S.C. § 2339A, which prohibits the provision of material support or resources "knowing or intending" that they be used for executing violent federal crimes. 18 U.S.C. § 2339A. While the statutory language of § 2339A includes an explicit *mens rea* requirement to further illegal activities, such a requirement is notably missing from the statutory language of § 2339B. Instead, § 2339B requires only that an individual knowingly provide material support or resources.[9] This Court must assume that Congress knows how to include a specific intent requirement when it so desires, as evidenced by § 2339A, and that Congress acted deliberately in excluding such an intent requirement in § 2339B.[10]

---

[8] The Court notes that the Supreme Court did not impose a specific intent requirement in any of these cases. Instead, the Supreme Court construed a *mens rea* requiring that a defendant act with knowledge of the prohibited conduct. *See Liparota*, 471 U.S. 419, 105 S. Ct. 2084 (defendant must know that he or she acquired or possessed food stamps in an unauthorized manner). *Staples*, 511 U.S. 600, 114 S. Ct. 1793 (defendant must know that he or she possessed an unregistered firearm), and *X-Citement Video*, 513 U.S. 64, 115 S. Ct. 464 (defendant must know that the performers in sexually explicit videos were minors).

[9] As discussed below, Congress clarified in the IRTPA amendments that a donor must know that the recipient of the material support or resources is a foreign terrorist organization or engages in terrorist activities.

Second, the legislative history indicates that Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds "under the cloak of a humanitarian or charitable exercise," sought to pass legislation that would "severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States." H.R. Rep. 104-383, at *43 (1995). As § 2339A was limited to donors intending to further the commission of specific federal offenses, Congress passed § 2339B to encompass donors who acted without the intent to further federal crimes.

In fact, during Congressional hearings on the legislation, representatives from civil liberties, humanitarian, and religious organizations objected to the criminalization of all donations without regard to a donor's intent and a donee's humanitarian deeds. *See* "Civil Liberties Implications of H.R. 1710, the Comprehensive Antiterrorism Act of 1995 and Related Legislative Responses to Terrorism": Hearing before the United States House of Representatives Committee on the Judiciary, 104th Congress (1995) (statement of Gregory T. Nojeim of the American Civil Liberties Union); "The Comprehensive Antiterrorism Act of 1995 and Its Implications for Civil Liberties": Hearing before the House Committee on the Judiciary, 104th Congress (1995) (statement of Azizah Y. Al-Hibri, American Muslim Council); "The Comprehensive Antiterrorism Act of 1995 and Its Implications for

---

[10] The Court notes that 18 U.S.C. § 2339C also included a specific intent requirement.

Civil Liberties": Hearing before the House Committee on the Judiciary, 104th Congress (1995) (statement of Ehalil E. Jahshan, National Association of Arab Americans).[11]

Congress, however, rejected these objections in enacting § 2339B. In fact, it made a specific finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[12] AEDPA § 301(a)(7), 18 U.S.C. § 2339B note. Congress's concerns regarding the fungibility of money and resources have also been noted by the Ninth Circuit. *See HLP I*, 205 F.3d at 1136 ("More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."). Moreover, the single sentence to which Plaintiffs cling—Senator Orrin Hatch's 1996 statement—is insufficient to negate Congress's subsequently enacted and amended clear intent.[13] This isolated statement does not justify a judicial reading of specific intent into the statute, particularly given that Senator Hatch subsequently supported the IRTPA without a specific intent provision.

---

[11] It is noteworthy that "the AEDPA's predecessor, the Violent Crime Control and Law Enforcement act of 1994, specifically excepted from 'material support,' 'humanitarian assistance to persons not directly involved' in terrorist activities . . . . However, the government enacted the AEDPA and specifically deleted this exception permitting contributions for humanitarian assistance . . . . " *District Court-HLP I*, 9 F. Supp. 2d at 1194 (citations omitted).

[12] Plaintiffs argue that this finding is undercut by Congress's allowance of unlimited donations of medicine and religious items. But as the Ninth Circuit explained in *HLP I*, Congress is entitled to select what types of assistance to allow and what types to prohibit. *See HLP I*, 205 F.3d at 1136 n.4.

[13] In introducing the Senate Conference Report to the Senate, Senator Hatch stated: "This bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in ter-

Finally, Congress's 2004 IRTPA amendment underscores Congress's decision to dispense with any specific intent requirement. The 2004 IRTPA amendment clarified that the only *mens rea* required under § 2339B is that a donor know that the recipient is a foreign terrorist organization.[14] Notably, Congress passed the IRTPA in the aftermath of the Ninth Circuit's decision in *HLP II* and the Middle District of Florida's contrasting decision in *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) and *United States v. Al-Arian*, 329 F. Supp. 2d 1294 (M.D. Fla. 2004), (together, "*Al-Arian*"). As discussed above, the Ninth Circuit held in *HLP II* that the Fifth Amendment required the government to prove that a donor knew the recipient was either a foreign terrorist organization or engaged in terrorist activities. The Middle District of Florida held in *Al-Arian* that the Fifth Amendment required the government to prove that a donor not only knew the recipient

---

rorist activities." 142 Cong. Rec. S3354 (April 16, 1996) (statement of Sen. Hatch).

[14] Plaintiffs previously asserted that the AEDPA was unconstitutional under the First Amendment because it prohibits donating material support even if the donor does not have the specific intent to aid in the recipient organization's unlawful activities. In rejecting Plaintiffs' specific intent argument under the First Amendment, the Ninth Circuit noted, "Material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used." *HLP I*, 205 F.3d at 1134. *See also District Court-HLP I*, 9 F. Supp. 2d at 1192.

was a foreign terrorist organization, but also that the donor specifically intended to further the terrorist activities of the foreign terrorist organization. This Court must assume that Congress, with full awareness of these decisions, incorporated the *HLP II* holding into the statute and rejected the *Al-Arian* ruling requiring specific intent. Therefore, the Court finds that an imposition of specific intent to further terrorist activities cannot be reconciled with Congress's clear intent in passing the AEDPA and the IRTPA.[15]

Based on Congress's recent IRTPA amendments, the Court believes that Congress would prefer to further amend the statute to cure any remaining vagueness problems rather than have a court impose a *mens rea* requirement that would eliminate the distinctions Congress purposely drew between § 2339B versus §§ 2339A and 2339C.[16] If, contrary to its findings and the legislative history of § 2339B, Congress did not, in fact, intend to dispense with a *mens rea* specific intent requirement, it remains free to amend the statute by explicitly requiring the additional element of specific intent. *See Staples,* 511 U.S. at 616 n.11, 114 S. Ct. 1793.

---

[15] This Court respectfully disagrees with the Middle District of Florida's decision in *Al-Arian*. In *Al-Arian*, the court engrafted a *mens rea* element into § 2339B, requiring that a donor of material support intend to further the terrorist activities of the foreign terrorist organization. The Middle District of Florida noted that courts should interpret statutes to avoid constitutional issues. The Court cited as examples the morally innocent cab driver or hotel clerk providing transportation or lodging, respectively, to a foreign terrorist organization member in New York City for a United Nations meeting. As discussed above, this Court finds that the legislative history of the statute and Congress's actions since the *Al-Arian* opinion reveal an unequivocal intent to exclude any *mens rea* requirement beyond the plain language of the statute, as amended by the IRTPA. Moreover, the circumstances of the hotel clerk and cab driver are not before this Court.

[16] While the Court recognizes that courts often defer to the political branches in the foreign affairs context, the Court also notes that its decision does not rest on that ground. Even in legislation affecting foreign affairs, the judiciary must, of course, balance constitutional rights

c. The *Mens Rea* Requirement in § 2339B Satisfies Any Due Process Concerns.

In any event, Congress's recent clarification of the *mens rea* required under § 2339B satisfies any due process issues under the Fifth Amendment. Significantly, the Ninth Circuit in *HLP II* did not extend its Fifth Amendment analysis of *Scales* to require that the government prove specific intent to further terrorist activities.[17] Rather, the Ninth Circuit held that it was sufficient to "avoid due process concerns" to require that the government "prove beyond a reasonable doubt that the accused knew that the organization was designated as a foreign terrorist organization or that the accused knew of the organization's unlawful activities that caused it to be so designated."[18] *HLP II,* 352 F.3d at 405. The AEDPA, as amended by the IRTPA, incorporates this reading of *mens rea* and prohibits the provision of material support to a recipient that the donor knows is a for-

---

with governmental interests. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

[17] As already noted above, *HLP II* was vacated by the Ninth Circuit after Congress enacted the IRTPA.

[18] Moreover, the Ninth Circuit read the statement by Senator Hatch upon which Plaintiffs rely as supportive of this level of *mens rea. See HLP II,* 352 F.3d at 402 (citing 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch)).

eign terrorist organization.[19] Accordingly, Congress's clarification of the *mens rea* requirement satisfies the notion of personal guilt under the Due Process Clause because an offender must know that he or she was materially supporting a foreign terrorist organization.

2. The Prohibitions on "Training," "Expert Advice or Assistance," and "Service" Are Impermissibly Vague, but "Personnel" Is Permissible.

Plaintiffs argue that the IRTPA amendments of the terms "training," "expert advice or assistance," and "personnel" fail to cure the vagueness concerns identified in *HLP I*, *District Court-HLP I*, and *District Court-HLP II*. Plaintiffs allege that, in fact, the IRTPA amendments exacerbate the vagueness concerns.[20] Moreover, Plaintiffs contend that Congress added another vague term, "service," to the statute. Defendants respond that the terms "training," "expert advice or assistance," "personnel," and "service" are clear and straightforward.[21]

---

[19] While *Al-Arian* interpreted § 2339B to have two elements of personal guilt, namely, knowledge of the recipient's status as a foreign terrorist organization and intent to further the organization's terrorist activities, the Court notes that the statute can also be read as having a single element of personal guilt. For instance, in *X-Citement Video*, the Supreme Court held that "the age of the performers is the crucial element separating legal innocence from wrongful conduct," as sexually explicit videos featuring adults would not be prohibited. *X-Citement Video*, 513 U.S. at 73, 115 S. Ct. 464. Here, the status of the recipient organization is the crucial element separating legal innocence from wrongful conduct, as the provision of material support to non-foreign terrorist organizations would not be prohibited by the AEDPA.

[20] The 2004 IRTPA amendment also states that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment. . . . " 18 U.S.C. § 2339B(i). Plaintiffs assert that such "boilerplate language" is superfluous and fails to eliminate constitutional concerns. The Court agrees, and Defendants do not contest, that this provision is inadequate to cure potential vagueness issues because it does not clarify the prohibited conduct with sufficient definiteness for ordinary people.

A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is "sufficiently clear so as not to cause persons 'of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.'" *United States v. Wunsch,* 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Vague statutes are void for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Foti v. City of Menlo Park,* 146 F.3d 629, 638 (9th Cir. 1998) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455

---

[21] As discussed above, Defendants' contention that Plaintiffs lack standing to attack the AEDPA for vagueness based on mere hypothetical situations ignores Plaintiffs' submitted evidence of their intended conduct. Plaintiffs do not seek injunctive relief as to hypothetical activities, but as to their own.

U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). "The requirement of clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms." *Information Providers' Coalition for the Defense of the First Amendment v. FCC,* 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted). Thus, under the Due Process Clause, a criminal statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954). A criminal statute must therefore "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . . " *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

After considering the arguments, the Court finds that the terms "training," "expert advice or assistance," and "service" are impermissibly vague under the Fifth Amendment. With respect to the term "personnel," the Court finds that the IRTPA amendment to "personnel" sufficiently cures the previous vagueness concerns. The Court addresses each of these terms separately below.

a. "Training" Is Impermissibly Vague.

This Court previously concluded that "training," an undefined term, was impermissibly vague because it easily reached protected activities, such as teaching how to seek redress for human rights violations before the United Nations. *See District Court-HLP I,* 9 F. Supp. 2d at 1204, *aff'd,* 205 F.3d 1130, 1138. The IRTPA amendment now defines "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2).

Plaintiffs contend that the amendment to "training" exacerbates the vagueness problem because Plaintiffs must now guess whether teaching international law, peacemaking, or lobbying constitutes a "specific skill" or "general knowledge." Defendants respond that training encompasses a broad range of conduct, ranging from flying lessons to training in the use of weapons.

The Court agrees with Plaintiffs that the IRTPA amendment to "training" (distinguishing between "specific skill" and "general knowledge") fails to cure the vagueness concerns that the Court previously identified. Even as amended, the term "training" is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits. Moreover, the IRTPA amendment leaves the term "training" impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.[22]

In fact, the Ninth Circuit indicated in *HLP I* that limiting "training" to the "imparting of skills" would be insufficient because such a definition would encompass protected speech and advocacy activities. The Ninth Circuit explained:

---

[22] Defendants contend that the AEDPA prohibits Plaintiffs from providing "advice or training 'on how to engage in human rights advocacy on their own behalf and on how to use international law to seek redress for human rights violations.'" Defendants' Opposition at 16. This position is in direct contrast to the Ninth Circuit and this Court's holdings, which recognized that such activities are protected under the First Amendment rights to free speech and association. *See HLP I*, 205 F.3d at 1137-38; *District Court-HLP I*, 9 F. Supp. 2d at 1204; *District Court-HLP II*, 309 F. Supp. 2d at 1200-01.

> Again, it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression fails within the scope of the term "training." The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet, presumably, this definition would encompass teaching international law to members of designated organizations. The result would be different if the term "training" were qualified to include only military training or training in terrorist activities.

HLP I, 205 F.3d at 1138.

"Training" implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand. Therefore, the Court finds that "training" fails to satisfy the enhanced requirement of clarity for statutes touching upon protected activities under the First Amendment or imposing criminal sanctions. *See Information Providers' Coalition for the Defense of the First Amendment*, 928 F.2d at 874.

b. "Expert Advice or Assistance" Is Impermissibly Vague.

The Court previously found "expert advice or assistance," an undefined term, to be impermissibly vague under the same analysis it applied to "training" and "personnel" because "expert advice or assistance" could be construed to include First Amendment protected activities. *See District Court-HLP II*, 309 F. Supp. 2d at 1200-01 ("The 'expert advice or assistance' Plaintiffs seek to offer includes advocacy and associational activities protected by the First Amendment, which Defendants concede are not prohibited under the USA PATRIOT Act.").

The IRTPA amendments define "expert advice or assistance" as "scientific, technical, *or other specialized knowledge*." 18 U.S.C. § 2339A(b)(3) (emphasis added). Plaintiffs contend that the "specialized knowledge" portion of this definition is vague because it merely repeats what an expert is and provides no additional clarity. Similar to their attack on the term "training," Plaintiffs assert that they must now guess whether their expert advice constitutes "specialized knowledge." Defendants argue that "expert advice or assistance" is not vague because the definition is derived from the established Federal Rules of Evidence regarding expert testimony.

The Court agrees with Plaintiffs that the IRTPA amendment to "expert advice or assistance" (adding "specialized knowledge") does not cure the vagueness issues. Even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand. Similar to the Court's discussion of "training" above, "expert advice or assistance" remains impermissibly vague because "specialized knowledge" includes the same protected activities that "training" covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations. Moreover, the Federal Rules of Evidence's inclusion of the phrase "scientific, technical, or other specialized knowledge" does not clarify the term "expert advice or assistance" for the average person with no background in law. Accordingly, the Court finds that the "expert advice or assistance" fails to provide fair notice of the prohibited conduct and is impermissibly vague.[23]

c. "Service" Is Impermissibly Vague.

Plaintiffs attack the IRTPA's insertion of the undefined term "service" to the definition of "material support or resources" on vagueness grounds.[24] According to Plaintiffs, the prohibition on "service" is at least as sweeping as the prohibitions on "training," "expert advice or assistance," and "personnel," as each of these could be construed as services. Defendants concede that the term "service" is broad, but argue that it is a common term that the dictionary defines (among other definitions) as "an act done for the benefit or at the command of another" or "useful labor that does not produce a tangible commodity." Defendants' Opposition at 21. Plaintiffs reply that Defendants' own definition is vague and would infringe on all sorts of speech and advocacy done for the benefit of another that is clearly protected by the First Amendment.

---

[23] Plaintiffs attack only the "specialized knowledge" portion of the definition of "expert advice or assistance" as vague. The Court's injunction of enforcement of this prohibition against Plaintiffs applies only to the "specialized knowledge" portion of the definition, not the "scientific, technical . . . knowledge" portion of the definition, which the Court finds is not vague.

[24] Plaintiffs did not file an amended complaint challenging the ban on "service," which was recently enacted in December 2004. In any event, the parties briefed the issue fully. In the interest of judicial economy, the Court deems the complaint amended so that these issues may be resolved together.

In addition, Plaintiffs note that Defendants' argument that any activity done "*for the benefit of another* " would violate the ban on "services" contradicts Defendants' concession that Plaintiffs could freely engage in "human rights and political advocacy *on behalf of* the PKK and the Kurds before any forum of their choosing." Defendants' Opposition at 17 (emphasis added). Plaintiffs argue that this supposed distinction proves their point. In other words, "service" is impermissibly vague because it forces Plaintiffs to guess whether their human rights and political advocacy constitutes action taken "on behalf of another," which Defendants concede is protected action, or "for the benefit of another," which Defendants argue is prohibited.

The Court finds that the undefined term "service" in the IRTPA is impermissibly vague, as the statute defines "service" to include "training" or "expert advice or assistance," terms the Court has already ruled are vague. Like "training" and "expert advice or assistance," "it is easy to imagine protected expression that falls within the bounds of" the term "service." *HLP I*, 205 F.3d at 1137. Moreover, there is no readily apparent distinction between taking action "on behalf of another" and "for the benefit of another." Defendants' contradictory arguments on the scope of the prohibition only underscore the vagueness. As with "training" and "expert advice or assistance," the term "service" fails to meet the enhanced requirement of clarity for statutes affecting protected expressive activities and imposing criminal sanctions.

d. "Personnel" Is Not Impermissibly Vague.

The Court previously found personnel to be impermissibly vague because it "broadly encompasses the type of human resources which Plaintiffs seek to provide, including the distribution of LTTE literature and informational materials and working directly with PKK members at peace conferences and other meetings." *District Court-HLP I*, 9 F. Supp. 2d at 1204. The Ninth Circuit affirmed, finding that the ban on personnel "blurs the line between protected expression and unprotected conduct," as an individual "who advocates the cause of the PKK could be seen as supplying them with personnel." *HLP I*, 205 F.3d at 1137.

The IRTPA amendment now limits prosecution for providing "personnel" to the provision of "one or more individuals" to a foreign terrorist organization "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). Further, the statute states that "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." *Id.* Plaintiffs argue that the new language distinguishing between acting under an organization's "direction and control" and acting "independently" still impinges on protected activities. Defendants respond that the IRTPA amendments use clear terms that are readily understandable to persons of ordinary intelligence.

The Court finds that the IRTPA amendment sufficiently narrows the term "personnel" to provide fair notice of the prohibited conduct. Limiting the provision of personnel to those working under the "direction or control" of a foreign terrorist organization or actually managing or supervising a foreign terrorist organization operation sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct.

3. The Prohibitions on "Training," "Expert Advice or Assistance," "Personnel," and "Service" Are Not Substantially Overbroad.

Plaintiffs also contend that the prohibitions on "training," "expert advice or assistance," "personnel," and "service" are sweepingly overbroad because they proscribe a substantial amount of speech activity that is protected by the First Amendment.[25]

"The First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges." *Virginia v. Hicks*, 539 U.S. 113, 118, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). Under the overbreadth doctrine, a "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Id.* at

---

[25] Plaintiffs recognize that the Court has previously rejected their overbreadth argument in the past, but wish to preserve their right to appeal.

118-19, 123 S. Ct. 2191 (internal quotation marks and citations omitted).

However, the Supreme Court has recognized that "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law-particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119, 123 S. Ct. 2191 (citations omitted). Accordingly, the Supreme Court requires that the "law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the 'strong medicine' of the overbreadth invalidation." *Id.*

This Court has previously rejected Plaintiffs' overbreadth arguments and sees no reason to revisit the issue, as the arguments remain the same. Plaintiffs have failed to establish that the prohibitions on "training," "personnel," "expert advice or assistance," and "service" are substantially overbroad, as the prohibitions are content-neutral and their purpose of deterring and punishing the provision of material support to foreign terrorist organizations is legitimate. Further, the statute's application to protected speech is not "substantial" both in an absolute sense and relative to the scope of the law's plainly legitimate applications. The Court, therefore, declines to apply the "strong medicine" of the overbreadth doctrine, finding instead that as-applied litigation will provide a sufficient safeguard for any potential First Amendment violation.

4. The IRTPA Does Not Impose an Unconstitutional Discretionary Licensing Scheme.

Plaintiffs' final argument in support of their motion for summary judgment is that the IRTPA exception to prosecution under 18 U.S.C. § 2339B(j) constitutes an unconstitutional licensing scheme.[26] The statutory exception provides:

> No person may be prosecuted under this section in connection with the term "personnel," "training," or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity.

18 U.S.C. § 2339B(j).

According to Plaintiffs, this provision grants the Secretary of State unfettered discretion to license speech because it targets those sections of 18 U.S.C. § 2339B(a) that concern expressive activity, namely, "training," "expert advice or assistance," and "personnel," and vests a government official with unbridled discretion to permit individuals to provide such support to foreign terrorist organizations. Plaintiffs rely on cases involving prior restraints to support their argument that 18 U.S.C. § 2339B(j) is an unconstitutional licensing scheme.

---

[26] Having found that "personnel" and the "scientific, technical . . . knowledge" portion of the ban on "expert advice or assistance" are not vague, the Court must address Plaintiffs' challenge to 18 U.S.C. § 2339B(j).

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), the Supreme Court struck down a licensing statute requiring permits from the mayor to place newspaper racks on public property because "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood*, 486 U.S. at 757, 108 S. Ct. 2138. Similarly, in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), the Supreme Court invalidated an ordinance regarding assembly and parade permit fees as an overly broad prior restraint on public speech. In striking the ordinance, the Supreme Court noted that a licensing scheme must be narrowly tailored with reasonable and definite standards, and must not be content-based or delegate overly broad discretion to the issuing official. *See Forsyth County*, 505 U.S. at 130-33, 112 S. Ct. 2395. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-27, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (prior restraint must include a time limit within which government official must decide whether to issue a license).

Defendants respond that these cases do not apply to the instant case, as § 2339B(j) is not a prior restraint licensing scheme. While conceding that the *City of Lakewood* and *Forsyth* involved restrictions on speech pending a permit from a government official, Defendants maintain that § 2339B(j) imposes no restriction at all on Plaintiffs' activities. Rather, according to Defendants, the other sections of the AEDPA, as discussed earlier, prohibit Plaintiffs from providing material support or resources to foreign terrorist organizations. *See* 18 U.S.C. § 2339B(a).[27]

The Court finds that 18 U.S.C. § 2339B(j) does not impose an unconstitutional licensing scheme. In fact, § 2339B(j) operates as an *exception* to prosecution under § 2339B(a) for providing material support or resources as to "training," "expert advice or assistance," and "personnel." As this Court has previously held, the AEDPA's actual prohibition on providing material support is not directed to speech or advocacy in violation of the First Amendment. *See District Court-HLP I*, 9 F. Supp. 2d at 1196-97, *aff'd*, 205 F.3d at 1135-36. Rather, Plaintiffs are restricted only from the conduct of providing material support to foreign terrorist organizations and remain free to exercise their First Amendment rights with no prior restraints. Accordingly, the *City of Lakewood* and *Forsyth* are inapplicable to this case.[28]

---

[27] Furthermore, Defendants assert that Plaintiffs lack standing to bring this claim because they are not harmed by the exception set forth in 18 U.S.C. § 2339B(j). The Court agrees that Defendants have asserted a sound argument regarding standing. Plaintiffs have failed to articulate how they are injured by 18 U.S.C. § 2339B(j), as the prohibition on providing material support is set forth in another section of the AEDPA. Nevertheless, the Court addresses Plaintiffs' claim on the merits.

[28] Moreover, the Court notes that even if the exception constituted a licensing scheme, there would be no unfettered discretion in its application. On the contrary, the Secretary of State cannot approve material support without determining that it will not be used for terrorist activity. This Court previously rejected Plaintiffs' challenges to the Secretary of State's discretion in designating foreign terrorist organizations, which requires a determination that an organization actually engages in terrorist activity. *See District Court-HLP I*, 9 F. Supp. 2d at 1199-1200; *see also HLP I*, 205 F.3d at 1137 (affirming this Court's decision and noting that because "the regulation involves the conduct of

The Court therefore DENIES Plaintiffs' motion for summary judgment on this basis, finding that Plaintiffs have failed to establish that 18 U.S.C. § 2339B(j) is an unconstitutional licensing scheme in violation of the First Amendment.

V. CONCLUSION

The Court concludes that Plaintiffs have standing to raise vagueness challenges to the terms "training," "expert advice or assistance," "personnel," and "service." Therefore, Defendants' motion to dismiss for lack of standing is DENIED.

The parties' cross-motions for summary judgment are GRANTED IN PART and DENIED IN PART as follows:

1. The Court finds that the lack of a specific intent requirement to further the terrorist activities of foreign terrorist organizations in the AEDPA's prohibition on providing material support or resources to foreign terrorist organizations does not violate due process under the Fifth Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

2. The Court finds that the AEDPA's prohibitions on material support or resources in the form of "training," "expert advice or assistance," "personnel," and "service" are not overbroad under the First Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

---

foreign affairs, we owe the executive branch even more latitude than in the domestic context").

3. The Court finds that the term "personnel" is not impermissibly vague under the Fifth Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

4. The Court finds that the terms "training"; "expert advice or assistance" in the form of "specialized knowledge"; and "service" are impermissibly vague under the Fifth Amendment. The Court therefore GRANTS Plaintiffs' motion and DENIES Defendants' motion on this ground.

5. The Court finds that the IRTPA amendment prohibiting the prosecution of donors who received approval from the Secretary of State to provide material support or resources is not an unconstitutional licensing scheme under the First Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

Accordingly, Defendants, their officers, agents, employees, and successors are ENJOINED from enforcing 18 U.S.C. § 2339B's prohibition on providing "training"; "expert advice or assistance" in the form of "specialized knowledge"; or "service" to the PKK or the LTTE against any of the named Plaintiffs or their members.[29] The Court declines to grant a nationwide injunction.

IT IS SO ORDERED.

---

[29] This Court's injunction does not enjoin enforcement of the remaining categories of material support or resources against Plaintiffs, namely, "property, tangible or intangible"; "currency or monetary instruments or financial securities"; "financial services"; "lodging"; "expert advice or assistance" in the form of "scientific or technical . . . knowledge"; "safehouses"; "false documentation or identification"; "communications equipment"; "facilities"; "weapons"; "lethal substances"; "explosives"; "personnel (1 or more individuals who may be or include oneself)"; and "transportation."

APPENDIX C

1. 18 U.S.C. 2339A provides:

Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses,

false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

2. 18 U.S.C. 2339B provides in pertinent part:

Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * * * *

(c) INJUNCTION.—Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) EXTRATERRITORIAL JURISDICTION.—

(1) IN GENERAL.—There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) EXTRATERRITORIAL JURISDICTION.—There is extraterritorial Federal jurisdiction over an offense under this section.

* * * * *

(g) DEFINITIONS.—As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization

under section 219 of the Immigration and Nationality Act.

(h) PROVISION OF PERSONNEL.—No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

(i) RULE OF CONSTRUCTION.—Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

(j) EXCEPTION.—No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

OPPOSITION
BRIEF

FILED

JUL 6 - 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1498

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

PETITIONERS

V.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID D. COLE
Counsel of Record
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 662-9078

(Additional counsel on next page)

SHAYANA KADIDAL
JULES LOBEL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

PAUL HOFFMAN
SCHONBRUN, DE SIMONE, SEPLOW,
HARRIS AND HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, California 90401
(310) 393-3055

VISUVANATHAN RUDRAKUMARAN
875 Avenue of the Americas
New York, New York 10001
(212) 290-2925

COUNSEL FOR RESPONDENTS

QUESTION PRESENTED

Whether the criminal prohibitions in 18 U.S.C. § 2339B(a)(1) on provision of "training," "expert advice or assistance" "derived from ... other specialized knowledge," and "service" to organizations designated as terrorist are unconstitutionally vague as applied to speech that furthers only lawful, nonviolent activities of the proscribed organizations.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and appellees and cross-appellants in the court of appeals, and are respondents in this Court: Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

The following parties were defendants in the district court and appellants and cross-appellees in the court of appeals, and are petitioners in this Court: the Attorney General of the United States, Eric Holder, Jr.; the United States Department of Justice; the United States Secretary of State, Hillary Rodham Clinton; and the United States Department of State.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 1

Statement 1

- A. The Statutory Scheme 3
- B. Respondents' Intended Support 6
- C. The Decisions Below 8

Reasons for Denying the Petition 11

- I. The Court of Appeals' Decision Does Not Warrant Review Because Its Narrow, As-Applied Ruling Leaves the Material-Support Statute Facially Intact and Permits Congress to Take Further Action 12
- II. The Decision Below Correctly Applies Settled Doctrine 17
  - A. The Provisions are Vague as Applied to Respondents' Intended Speech 17
    - 1. Training 17
    - 2. Expert Advice or Assistance 19
    - 3. Service 20
  - B. The Provisions At Issue Directly Implicate Speech and Associational Rights, Triggering Heightened Vagueness Standards 22
  - C. The Government's Proposed Statutory Construction Conflicts with the Statute's Plain Language, and Would Not Cure the Provisions' Infirmities 28

Conclusions 30

TABLE OF AUTHORITIES

Page

Cases:

American Civil Liberites Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008) 13

Boy Scouts v. Dale, 530 U.S. 640 (2000) 25-26

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 27

California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141 (9th Cir. 2001) 23

Cutter v. Wilkinson, 544 U.S. 709 (2005) 20

Elfbrandt v. Russell, 384 U.S. 11 (1966) 28

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 20

Grutter v. Bollinger, 539 U.S. 306 (2003) 20

Houston v. Hill, 482 U.S. 451 (1987) 27

Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000) 22

Info Providers' Coal. For the Def. of the First Amendment v. FCC, 928 F.2 866 (9th Cir. 1991) 9

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 28

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999)..23

Mukasey v. American Civil Liberites Union,
129 S. Ct. 1032 (2009)....................................13

NAACP v. Claiborne Hardware Co., 458 U.S. 886
(1982)...28

Noto v. United States, 367 U.S. 290 (1961)..........28

Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).....................20

Pierce v. Underwood, 487 U.S. 552 (1988)...........23

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).....................13

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997)..22

Texas v. Johnson, 491 U.S. 397 (1989) 25

United States v. Hescorp, Heavy Equip. Sales Corp., 801 F.2d 70 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986)......................................23

United States v. Homa Int'l Trading Corp.,
387 F.3d 144 (2d Cir. 2004) 23

United States v. Iqbal, No. 06-Cr-1054 (RMB)
(S.D.N.Y. filed Jan. 20, 2007)............................15

United States v. O'Brien,
391 U.S. 367 (1968)..24, 25

United States v. Robel,
389 U.S. 258 (1967)..28

United States v. Shah, No. 05-Cr-673 (LAP)
(S.D.N.Y. filed Dec. 6, 2006)...............................15

United States v. Sperry Corp.,
493 U.S. 52 (1989)..13

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)
....23, 27

Constitution, Statutes and Rule:

U.S. Const.:

Amend I...passim

Amend V..passim

Antiterrorism and Effective Death Penalty Act (AEDPA) Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996).............3, 4

Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762 (2004)...............5

USA Patriot Act of 2001, Pub. L. No. 107-56, §805(a)(2), 115 Stat. 272, 377 (2001).................5

8 U.S.C. § 1182(a)(3)(B) 3

8 U.S.C. § 1189...3

8 U.S.C. § 1189(a) 3

8 U.S.C. § 1189(d)(2)..3

18 U.S.C. § 2339A(a)..3

18 U.S.C. § 2339A(b)..2, 6

18 U.S.C. § 2339A(b)(1) 4

18 U.S.C. § 2339A(b)(2) 5

18 U.S.C. § 2339A(b)(3) 6

18 U.S.C. § 2339B 1-4

18 U.S.C. § 2339B(a)...3

18 U.S.C. § 2339B(a)(1) 4

18 U.S.C. § 2339B(g)(4) 3

18 U.S.C. § 2339B(h)......................................6, 21

18 U.S.C. § 2339B(i)..5, 21

Fed. R. of Evid. 702......................................20, 23

Miscellaneous:

H.R. Rep. No. 100-660 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766 13

H.R. Rep. No. 104-383 (1995) 5

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (Pet. App. 33a-76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1176, and 9 F. Supp. 2d 1205.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The Fifth Amendment provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law." The relevant statutory provisions are reprinted at Pet. App. 77a-81a.

STATEMENT

The injunction at issue in this case narrowly bars the application of three provisions of 18 U.S.C. §

2339B, a criminal proscription carrying a penalty of 15 years' imprisonment or life imprisonment if death results, to respondents' proposed speech in support of the lawful, nonviolent activities of two foreign organizations designated as "terrorist." The court of appeals left the entire statute valid on its face, and merely held that the prohibitions on providing "training," "expert advice or assistance" "derived from ... other specialized knowledge," and "service" were unconstitutionally vague as applied to respondents' proposed speech. Respondents seek, among other things, to teach persons in conflict situations how to use international law and other nonviolent means to advance human rights. As applied to such pure speech, the court held, the three particular provisions are insufficiently clear about what they criminalize.

The district court rejected all of respondents' challenges except to the application of the three provisions noted, and therefore left intact the entire material-support statute on its face. The court declined to issue a nationwide injunction. Pet. App. 76a. Even as applied to respondents, the court's decision expressly permits enforcement of the remainder of the statute, which prohibits provision of, *inter alia*, "any property, tangible or intangible, ... including currency or monetary instruments or financial securities, financial services, lodging, ... safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel ... and transportation." 18 U.S.C. § 2339A(b) (definitional provision incorporated into § 2339B); *see* Pet. App. 76a n.29.

The court of appeals unanimously affirmed the district court in all respects, upholding the limited injunction and rejecting the remainder of respondents' claims. The court of appeals denied the government's petition for rehearing en banc, again without dissent.

A. The Statutory Scheme

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act (AEDPA), codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, respectively, authorize the Secretary of State to designate "foreign terrorist organizations" and make it a crime to provide certain "material support" for even nonviolent and humanitarian activities of such groups.

Section 1189 of 8 U.S.C. authorizes the Secretary to designate as "terrorist" any group: (1) that is foreign; (2) that has ever used or threatened to use a weapon against person or property; and (3) whose activities threaten the "national defense, foreign relations, or economic interests of the United States."[1] Once the Secretary designates a group, it becomes a crime to "knowingly provide[] material support or resources" to it, 18 U.S.C. § 2339B(a), with the phrase "material support or resources" defined as "mean[ing]" certain activities listed in a definition of the same phrase in a related statute. *See* 18 U.S.C. § 2339B(g)(4), incorporating definitions of 18 U.S.C. § 2339A(b). Unlike other federal statutes criminalizing support for "terrorist activity," *see, e.g.*, 18 U.S.C. § 2339A(a), the prohibition at issue here, § 2339B(a)(1), does not require any showing that the defendant intended that his support be used for any terrorist, violent, or independently illicit purpose. "Knowing[]" provision of "material support or resources" to a designated group is enough.

---

[1] 8 U.S.C. § 1189(a) (criteria for designation); 8 U.S.C. § 1182(a)(3)(B) (definition of "engage in terrorist activity"); 8 U.S.C. §1189(d)(2) (definition of "national security").

In enacting the material-support statute in 1996, Congress declared that any "*contribution to*" a foreign organization that engages in terrorist activity "facilitates that conduct." AEDPA, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996), 18 U.S.C. § 2339B note (emphasis added). Then, in defining its proscriptions, Congress listed a number of activities, using terms of varying clarity and breadth, while expressly permitting unlimited donations of medicine and religious materials. 18 U.S.C. § 2339A(b)(1). In the Ninth Circuit, the government argued that Congress was trying not to impinge on actual speech:

> The law was carefully drafted ... to ensure that it does not infringe upon constitutional rights. Recognizing that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," Congress noted that the statutory ban "only affects one's contribution of financial or material resources" to a foreign terrorist organization, a ban that is permissible because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities." But "[t]he basic protection of free association afforded individuals under the First Amendment remains in place"

> in place" even under the statutory prohibition, because it does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization."

C.A. First Cross-Appeal Br. for Appellants at 5-6 (Apr. 4, 2006) (quoting H.R. Rep. No. 104-383, at 43, 44 (1995)). And in 2004 Congress added to the statute an express recognition that application of the statute might infringe First Amendment interests, and disclaimed any intent to abridge such rights in the statute's construction or application:

> (i) **Rule of construction.**—Nothing in this section shall be *construed or applied* so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

18 U.S.C. § 2339B(i) (emphasis added).

Partly in response to several decisions in this litigation, Congress amended the statute in the USA Patriot Act of 2001, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (2001), and again in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762 (2004). The current version of the statute prohibits provision of "training," which the statute since 2004 has defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). The statute also outlaws the provision of "expert advice or assistance," which since 2004 has been defined as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). And, in a provision added in 2004, the statute prohibits the provision of "service," without defining that term. The government maintains that "service" includes any "act done for the benefit of" a designated group. Pet. 17. The statute contains many other enumerated prohibitions that are not now at issue – quoted *supra*.[2]

B. Respondents' Intended Support

Respondents include the Humanitarian Law Project (HLP), a longstanding human rights organization with consultative status to the United Nations; Ralph Fertig, a retired United States administrative law judge who has served as the HLP's President; Nagalingam Jeyalingam, an American physician; and several domestic organizations of persons of Tamil descent. Prior to AEDPA's enactment, the HLP and Judge Fertig had been assisting the

---

[2] One provision – which the court of appeals and district court upheld and so is not at issue in the petition (but is addressed in respondents' limited conditional cross-petition) – is the prohibition on providing "personnel." 18 U.S.C. § 2339A(b). Since 2004, the amended statute has provided:

> No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h).

Kurdistan Worker's Party (PKK) in human rights advocacy and peacemaking efforts. They seek to continue supporting the PKK in such activities. Dr. Jeyalingam and the Tamil organizations similarly seek to engage in speech in support of the humanitarian and political activities of the Liberation Tigers of Tamil Eelam (LTTE).[3]

In the mid-1990s, the Secretary of State designated both the PKK and LTTE as terrorist organizations. In this case, resolved on summary judgment, the district court made no findings about terrorist activities of either group, but did find that both groups engage in a broad range of lawful activities, including the provision of social services, political advocacy, and economic development. Pet. App. 34a-36a. The PKK is the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations. *See id.* at 34a-35a. Similarly, the LTTE is the principal political organization representing the Tamils in Sri Lanka, another ethnic minority that has been subjected to human rights abuses and discrimination. *See id.* at 35a. It is undisputed that respondents intend to support only the *lawful and nonviolent* activities of these groups. *Id.* at 34a-36a (describing intended support).

---

[3] As the petition notes, the LTTE were recently defeated militarily in Sri Lanka. Pet. 5 n.1. Much of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot, because it consisted of humanitarian assistance to persons living in LTTE-controlled areas of Sri Lanka. However, the LTTE continues to exist as a political organization outside Sri Lanka advocating for the rights of Tamils, and respondents continue to seek to support its lawful, nonviolent activities through the speech identified by the court of appeals, Pet. App. 5a n.1.

C. The Decisions Below

Respondents initially filed this action in 1998, after the Secretary of State designated the PKK and the LTTE as foreign terrorist organizations. They challenged the statute on First and Fifth Amendment grounds, and asserted, among other things, that the statute's prohibitions on providing "training" and "personnel" were unconstitutionally vague. (Neither provision was defined in the original 1996 statute). The district court granted respondents a preliminary and permanent injunction against enforcement of these two provisions, finding them unconstitutionally vague. *See* Pet. App. 6a-7a. It rejected respondents' other challenges, including their contention that the statute infringed on the right of association. *Id.* Two separate panels of the court of appeals, in 2000 and 2003, unanimously affirmed both the preliminary and permanent injunctions. *Id.* at 7a, 8a.

Meanwhile, when Congress in 2001 amended the "material support" statute to add a prohibition on the provision of "expert advice or assistance," respondents filed a second challenge. The district court in March 2004 held that this provision, too, was unconstitutionally vague. *See id.* at 8a.

In September 2004, in the original case, the court of appeals granted rehearing en banc (on requests from both parties). *Id.* at 9a. While en banc review was pending, Congress in 2004 amended the statute, providing definitions for "training," "personnel," and "expert advice or assistance," and adding a new, and undefined, prohibition on the provision of "service." *Id.*

at 9a-10a. In response, the en banc court of appeals remanded for consideration of the effect of these statutory amendments. *Id.* at 11a.

On remand, the district court held that Congress's definition of "personnel" cured the vagueness of that provision, but that the prohibitions on "training" and on "expert advice or assistance" "derived from ... other specialized knowledge" were still unconstitutionally vague as applied to respondents' intended speech. *Id.* at 62a-66a, 68a-69a. It also held that the new, and undefined, ban on the provision of "service" was vague as applied to respondents' speech. *Id.* at 66a-68a. It rejected respondents' other contentions. *Id.* at 46a-60a, 69a-74a.

Both parties appealed, and the court of appeals once again unanimously affirmed. It reasoned that the constitutional "'requirement for clarity is enhanced'" where, as here, a criminal statute touches on "'sensitive areas of basic First Amendment freedoms.'" *Id.* at 20a (quoting *Info. Providers' Coal. for the Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991)). It stressed that it was addressing only the provisions' vagueness as applied to respondents' conduct, *id.* at 2a, 22a n.6, and noted that those activities all constituted speech. *Id.* at 5a n.1 (describing respondents' proposed activities as "to train members ... on how to use humanitarian and international law to peacefully resolve disputes"; "to engage in political advocacy"; "to teach ... members how to petition various representative bodies such as the United Nations for relief"; "to train members to present claims for tsunami-related aid to mediators and international bodies"; "to offer their legal expertise in negotiating in negotiating peace agreements"; "to engage in political advocacy").[4]

With respect to "training," the court found it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami related aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. Stressing that the term as defined "could still be read to encompass speech and advocacy protected by the First Amendment," *id.* at 22a, the court held that

> the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."

Id. at 22a-23a (quoting *id.* at 64a).

The court noted that the prohibition on "expert advice or assistance" similarly encompassed protected speech, and concluded that it was unconstitutionally vague in part. *Id.* at 24a. Specifically, it held that the prohibition on advice or assistance "derived from ... other specialized knowledge" did not give "a person of ordinary intelligence reasonable notice of conduct prohibited under the statute." *Id.* at 23a; *see also id.* at 23a-24a. But the court upheld the prohibition on advice or assistance "derived from scientific [or] technical ... knowledge." *Id.* at 24a.

---

[4] Respondents initially sought to provide a broader range of humanitarian assistance to the PKK and the LTTE, but the injunction affirmed by the court of appeals is limited to the speech activities described by the district court and the court of appeals. Pet. App. 5a n.1; *id.* at 35a-36a.

The court also held vague as applied the prohibition on "service," which encompassed the bans on "training" and "expert advice or assistance" that it had already held vague. *Id.* at 25a (adopting district court's holding and reasoning at *id.* at 66a-68a).

The court agreed with the district court that the amended definition of "personnel" cured that term's prior vagueness. *Id.* at 26a-27a. And it rejected respondents' other contentions, including the contention that the statute imposed guilt by association in violation of the Fifth Amendment's requirement that statutes impose only individual culpability. *Id.* at 13a-19a; *id.* at 27a-32a.

REASONS FOR DENYING THE PETITION

The petition should be denied. The decision below is a straightforward application of settled vagueness doctrine, resulting in a narrow decision carefully confined to three sub-provisions of the material-support statute as they apply to respondents' proposed speech activities. The government has identified no decision from any court, much less this Court or a court of appeals, that is in conflict with the decision below. The decision itself applies to a unique context involving pure speech that Congress in all likelihood did not intend to criminalize, and that in any event is peripheral to the statute's purpose. The decision leaves the material-support statute valid on its face, and declares only a small portion of it vague *as applied* to respondents' intended speech in support of indisputably lawful and nonviolent ends. Thus, the government may continue, and has continued, to enforce the material-support statute, including the provisions enjoined as applied here.

Moreover, because the decision below rests on vagueness, Congress remains free to define more precisely the conduct it seeks to prohibit, should it conclude that it is critical to ban "training," "expert advice or assistance," and "service" as applied to speech in support of otherwise lawful activities. The court's decision does not rule these activities immune from regulation, but merely demands greater precision.

The government's protestations about national security aside, it has made no showing that the limited injunction at issue here undermines its efforts to fight terrorism in any meaningful way. Nor has it cited a single prosecution that was or would have been frustrated by the court of appeals' narrow, as-applied ruling.

I. The Court of Appeals' Decision Does Not Warrant Review Because Its Narrow, As-Applied Ruling Leaves the Material-Support Statute Facially Intact and Permits Congress to Take Further Action

The government identifies no conflict in the circuits, but contends that review is nonetheless warranted on the ground that the decision below invalidates part of an Act of Congress, and because "the material-support statute is an important tool in the Nation's fight against international terrorism." Pet. 10-11. But the decision below leaves the entirety of the material-support statute facially intact, and enjoins only three specific sub-provisions as applied to respondents' pure speech in support of lawful, nonviolent ends. In any event, this Court does not automatically review decisions invalidating federal statutes.

The government does not and could not assert that a case in which an Act of Congress is invalidated always merits review. Pet. 9. Congress itself rejected that conclusion in 1988, when, with the support of all nine Justices, it eliminated 28 U.S.C. § 1252's provision for non-discretionary appellate jurisdiction in cases declaring federal statutes unconstitutional. *See United States v. Sperry Corp.*, 493 U.S. 52, 59 & n.5 (1989); H.R. Rep. No. 100-660, at 2, 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 767, 774.

Earlier this year, the Court denied a government petition seeking review of a ruling that invalidated an Act of Congress on First Amendment (including vagueness) grounds. *Mukasey v. American Civil Liberties Union*, 129 S. Ct. 1032 (2009) (denying United States petition, No. 08-565, seeking review of *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008)). Even before the amendment of 28 U.S.C. § 1252, the Court denied review where, as here, a lower court had merely held that a federal statute could not be applied constitutionally to a particular set of facts. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (declaring that Title VII provisions prohibiting race and sex discrimination were unconstitutional as applied to church's decision to hire a pastor), *cert. denied*, 478 U.S. 1020 (1986).

Review in this case should similarly be denied. The decision below is carefully circumscribed, holding only that three particular sub-provisions of a statute are invalid *as applied to the pure speech in which respondents want to engage*. The court of appeals did not invalidate any aspect of the statute on its face and, in fact, specifically disclaimed any such ruling. Pet. App. 2a-3a, 22a n.6, 27a-29a. The court also expressly noted that its ruling did not extend to a situation where any money passed to the designated organizations. *Id.* at 3a, 25a n.8. The limited activities that the court of appeals identified as protected by the narrow injunction it upheld are all pure speech. *Id.* at 5a n.1 ("to train members ... on how to use humanitarian and international law to peacefully resolve disputes"; "to engage in political advocacy"; "to teach ... members how to petition various representative bodies such as the United Nations for relief"; "to train members to present claims for tsunami-related aid to mediators and international bodies"; "to offer their legal expertise in negotiating peace agreements"; "to engage in political advocacy").

The court of appeals' ruling leaves the entire statute valid on its face. The government is free to enforce the statute – including the "training," "expert advice or assistance," and "service" clauses -- in other contexts, and, by its own account, it has done so successfully. Pet. 11. The only direct restriction the decision imposes is on enforcement of three specific provisions against these respondents for the speech identified above. The government cites not a single instance of similar speech in furtherance of lawful, nonviolent activities that it has been frustrated from prosecuting.[5]

The decision does not warrant review for a related reason. The court of appeals held only that the particular provisions at issue were written too vaguely. That ruling does not foreclose further congressional action; Congress need only be more precise in targeting forms of support that it concludes warrant criminal prohibition, thereby avoiding needless collateral harm to First Amendment protected speech and association. Such a process of further congressional consideration and refinement is particularly appropriate given that Congress, as it expressly declared in 2004 and the government stressed to the court of appeals, was acutely aware of the sensitive First Amendment terrain and positively trying to avoid harm to protected speech. *See* page 4, *supra*.

---

[5] The government cites only two cases in which it has charged defendants with providing "training," "expert advice or assistance," or "service." Pet. 11. In both it confronted no obstacles to proceeding. Neither involved speech in furtherance solely of lawful, nonviolent ends. In *United States v. Shah*, No. 05-Cr-673 (LAP) (S.D.N.Y. filed Dec. 6, 2006), defendants were alleged to have provided "martial arts training and instruction" to al Qaeda and "medical support to wounded jihadists." Pet. 11. In *United States v. Iqbal*, No. 06-Cr-1054 (RMB) (S.D.N.Y. filed Jan. 20, 2007), defendant was alleged to have sold satellite transmission services to Hizballah, which the indictment characterized as, *inter alia*, "property, tangible and intangible," and "facilities," provisions not at issue here. Superseding Indictment at 3. Both cases resulted in convictions. The government has cited no case in which it has sought to prosecute individuals for pure speech in furtherance of lawful activities but was, or would have been, barred from doing so by this decision.

In this respect, the constitutional ruling by the court of appeals is not the end of the matter for Congress. It bears important similarities to statutory rulings, to which Congress may respond through ordinary legislation. Such rulings generally do not warrant this Court's review without a persistent circuit conflict. Indeed, when earlier versions of this very statute were held invalid, the Executive returned to Congress and obtained statutory clarifications. While the court below held that some of those clarifications were not adequate, Congress can readily undertake further revisions, with the added guidance the court below has provided.

Moreover, the government's own argument that there are "numerous legitimate applications" of the ban on training – for example, "training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money" (Pet. 21) – shows how easy it is to write more precisely to target specific activities of concern, without criminalizing constitutionally protected speech. Nothing in the court of appeals' opinion precludes Congress from criminalizing the provision of instruction in techniques that terrorist organizations have used to carry out violent attacks.

Finally, the government cites no conflict in the circuits, notwithstanding that the statute has been on the books for more than a decade, and in its current amended form for five years. In the absence of any disagreement in the circuits, any evidence that the decision has undermined the government's anti-terrorism efforts, or any reason to believe the court's narrow as-applied holding will have wider effects, the case does not merit review.[6]

II. The Decision Below Correctly Applies Settled Doctrine

The court of appeals correctly applied clearly established principles of constitutional law. Its conclusions that the statute's prohibitions on the provision of "training," "expert advice or assistance" in the form of information "derived from ... specialized knowledge," and "service" are unconstitutionally vague as applied to respondents' proposed speech are firmly grounded and raise neither new nor significant questions of law.

A. The Provisions Are Vague As Applied to Respondents' Intended Speech

1. Training

The court of appeals correctly held that the prohibition on "training" requires individuals to draw impossible distinctions between prohibited instruction in a "specific skill" and permissible instruction in "general knowledge." Pet. App. 20a-23a. Respondents are forced to guess at whether human rights advocacy or peacemaking, for example, are "specific skills" or "general knowledge." And what about training in public speaking, lobbying Congress, or public relations? The statute provides no guidance.

---

[6] The court of appeals rejected respondents' contention that the bans on providing "personnel" and "expert advice or assistance" "derived from scientific [or] technical ... knowledge" were similarly unconstitutional. Respondents do not independently seek certiorari on those aspects of the court's ruling. But they are filing a conditional cross-petition for certiorari, because these provisions are sufficiently related to the three provisions at issue in the government's petition to warrant review as well, if the Court grants review at all.

The attempts by government counsel below to clarify the distinction only confirmed how murky it is. Counsel opined that, under this definition, teaching geography would be permissible because it constitutes "general knowledge," but teaching the political geography of terrorist organizations would constitute a banned "specific skill," as would the teaching of English.[7] What if a "general" course on geography included a discussion of the political geography of terrorist organizations? What if it included a session on the history of geography, or the geography of a specific region incorporating statistical information? An ordinary person could only hazard a guess as to whether these are impermissible "specific skills," or permissible aspects of "general knowledge."

In the district court, government counsel asserted that respondents were free to advocate "on behalf of" the PKK before the United Nations or "any forum of their choosing." Govt. Mem. in Supp. of S.J. at 17 n.8. But when the district court asked whether respondents could lobby the UN with members of the PKK present, and then divide up into groups to lobby the rest of the UN, counsel first opined that such conduct "presumably could" constitute "training," D.

---

[7] The colloquy took place during the en banc oral argument, at approximately 49 minutes into the argument. At the time of oral argument, Congress had passed IRTPA, but President Bush had not yet signed it into law.

Ct. Tr. 11, SER 220,[8] and minutes later opined that it "clearly comes within the proscriptions against training and expert advice or assistance." *Id.* at 15; SER 224. At the close of the colloquy, the district court said, "I don't know how you think anyone, a normal person, would figure this out based on this exchange." *Id.* at 19, SER 228. The court of appeals correctly determined that this provision is unconstitutionally vague as applied to respondents' proposed speech.

2. Expert Advice or Assistance

The court also correctly concluded that the ban on providing "expert advice or assistance" "derived from ... specialized knowledge" is unconstitutionally vague. Much as with "training," a citizen must guess as to whether any aspect of his advice is somehow derived from "other specialized knowledge." An expert on human rights could presumably provide advice only if it was derived from "general knowledge," but not if any particular answer was informed by "specialized knowledge." But how does one distinguish which aspects of human rights derive from general as opposed to specialized knowledge? Indeed, if general knowledge is "specialized knowledge" that has become sufficiently widely known, then literally all general knowledge may be said to be "derived from" specialized knowledge.[9]

---

[8] "SER" refers to the Supplemental Excerpts of Record in the court of appeals.

knowledge.[9] The lower court correctly determined that this provision, too, is vague as applied here.

3. Service

The most expansive provision in the definition of "material support" is the prohibition on providing any "service" to a designated group, which Congress added in 2004 without defining the term. That term was likewise correctly held unconstitutionally vague.

Attempting to show otherwise, the government, citing a dictionary, maintains that the term encompasses any "act done for the benefit ... of another." Pet. 17. But that interpretation only makes matters more confusing, as it appears to conflict with the narrowing limitations Congress simultaneously placed in the statute's other definitions. Thus, while Congress provided that teaching a subject of "general knowledge" would *not* constitute prohibited "training," it *could* be considered an "act done for the benefit of" a designated group. Similarly, advice derived from non-specialized knowledge is exempted from the "expert advice" definition, but could be prohibited by the government's gloss on "service." The "personnel" definition added in 2004 likewise seeks to protect acts done "entirely independently of the ... organization to advance its goals or objectives," 18 U.S.C. § 2339B(h), yet such activity would be a crime if seen as "for the benefit of" the organization. And, as noted above, Congress in 2004 (the same time that it added the "service" prohibition) specifically disclaimed that its statute should be construed or applied to outlaw protected speech (*id.* § 2339B(i)) – such as, *e.g.*, a domestic speech stressing the humanitarian work of a designated organization to improve its reputation, which could certainly be seen as "for the benefit of" the organization. The government's construction of "service" renders the statute hopelessly vague.

---

[9] The government notes that the definition tracks Federal Rule of Evidence 702. Pet. 15. As the district court held, however, Rule 702, a general guide for trained judges and lawyers, "does not clarify the term ... for the average person with no background in the law." Pet. App. 66a. It is one thing to use the standard as a guide to judges overseeing civil litigation; it is another to hold citizens criminally liable under such terms. Here, as elsewhere in the law, "context matters." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

At the same time, the government claims that the statute does *not* reach advocacy "on behalf of" a designated group. Govt. Mem. in Supp. of S.J. at 17 n.8. But if that is so, respondents must somehow distinguish between permissibly advocating "on behalf of" and impermissibly advocating "for the benefit of" a designated group. How is an ordinary person supposed to know whether his advocacy of the PKK's position on Kurdish human rights is permissible advocacy "on behalf of" the group, or a proscribed service "for the benefit of" the group?

As construed by the government, the "service" provision also forces individuals to guess whether their affiliation with a group may constitute a prohibited "service." Before the "service" prohibition was added in 2004, the government represented that citizens were free under this statute to join designated groups, and that concession was critical to the court of appeals' rejection of respondents' right-of-association challenge. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (rejecting First Amendment associational challenge because the statute permits membership and affiliation with foreign terrorist organizations, but prohibits the conduct of providing material support or resources). But the permissibility of membership and affiliation is now in doubt. Joining or affiliating with a political organization is quintessentially an act done "for the benefit of" the group. Thus, the government's construction would appear to criminalize even pure membership and affiliation. The government does not explain how one is supposed to distinguish between ostensibly permitted membership and advocacy, on the one hand, and "service," on the other. Citizens are forced to guess, at their peril. Accordingly, the court of appeals correctly deemed this provision unconstitutional as applied as well.

B. The Provisions At Issue Directly Implicate Speech and Associational Rights, Triggering Heightened Vagueness Standards

The government's principal response to the court of appeals' unsurprising and unanimous conclusion that these provisions are vague as applied to respondents' speech is to cite inapposite examples of terms deemed not vague where First Amendment interests and/or criminal penalties were *not* at stake. Pet. 13-18. But vagueness standards are at their most demanding when a criminal prohibition affects speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Village of Hoffman Estates v. Flipside,* *Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). All of the government's examples arise from contexts tolerating more lenient vagueness standards – such as determining an appropriate attorney's fee (Pet. 15),[10] admitting expert evidence in court (Pet. 16),[11] prohibiting the overseas transfer of money (Pet. 17)[12] or heavy equipment (Pet. 18),[13] or noncriminal regulation of public employees' speech (Pet. 14).[14]

---

[10] *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). *Pierce* did not address any vagueness issue, or purport to define (or explore the precision of) the difference between "some distinctive knowledge or specialized [litigation] skill" and "general lawyerly knowledge" – both of which, from a lay person's perspective, might or might not be "specialized knowledge" in the present context.

[11] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). *Kumho* did not address any vagueness issue, or purport to explore the precision of "specialized knowledge" in Fed. R. Evid. 702.

[12] *United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (transferring money for a fee was undeniably a service).

[13] *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 73-77 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986). *Hescorp* undertook a lengthy analysis of an Executive Order's various provisions and its history before concluding that, in context, the "service" exception in the order could not reasonably be understood to apply to limit the separately stated flat prohibition on transferring physical goods to Iran. Even in the absence of a speech issue, the court's rejection of an ordinary vagueness challenge required extensive reliance on interpretive guides that are simply missing in the present context.

[14] The government's one cited authority involving speech is the Ninth Circuit's own decision in *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001). There, the court rejected a facial vagueness challenge to a law that required public school teachers to use English predominantly in their instruction. In that context, involving the interests of public employees in public schools and no apparent criminal penalties, the court explained that the rest of the law made clear that "instruction" was tied to the "curriculum," and on that basis concluded that there was no substantial number of instances where there would

The government maintains that, as applied in this case, "the material-support statute does not regulate speech," and therefore does not warrant heightened vagueness scrutiny. Pet. 13. That is simply false, both as applied and more generally. All of the activities the court of appeals listed as at stake here *are* pure speech. *See* Pet. App. 5a n.1 (quoted at page 10, *supra*). More generally, when the statute prohibits "training," defined as "*instruction or teaching*," it directly criminalizes speech. When the statute prohibits conveying "expert *advice*," it again directly criminalizes speech. And when the statute prohibits "service" as applied to respondents' intended activities, it also criminalizes speech – including, according to the government, any advocacy done "for the benefit of" a designated group. As applied here, these provisions would criminalize the teaching of humanitarian and international law, as well as political advocacy. The essential premise of the Government's challenge in its petition is therefore wrong.

For the same reason, the government is mistaken in contending that the material-support statute is sustainable as a content-neutral regulation of conduct under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Pet. 19-20. The *O'Brien* intermediate scrutiny standard is reserved for content-neutral regulations of conduct that only incidentally affect speech or association, *i.e.*, where the conduct might have an expressive aspect. *O'Brien* does not apply to

---

be doubt about when English had to be used – in the classroom to present the curriculum, not in private conversations with students and parents, etc.

direct criminalization of actual speech or association, or to content-based discrimination. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 402-03 (1989) (*O'Brien* inapplicable to content-based flag desecration law). As shown above, the statute here criminalizes speech *qua* speech. And, far from being a mere regulation of time, place, or manner, it flatly bans certain speech to or for certain persons. Moreover, the provisions barring "training" and "expert advice or assistance" expressly discriminate on the basis of its content, favoring speech on subjects of "general knowledge" and disfavoring speech about "specific skill[s]" or derived from "specialized knowledge." Thus, *O'Brien* does not apply.

O'Brien also does not apply where a law directly regulates expressive association. In *Boy Scouts v. Dale,* 530 U.S. 640, 659 (2000), the Court held *O'Brien* inapplicable where a state's general ban on discrimination in public accommodations was applied to the Boy Scouts in a way that directly infringed the group's rights of "expressive association" (by restricting its ability to choose who would serve as a scoutmaster). As the Court explained:

> Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien,* 391 U.S. 367 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech-in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a

symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

The same holds true in this case. As in *Dale*, the application of the law directly infringes respondents' associational rights, by precluding them from engaging in any expressive activity whatsoever in conjunction with the PKK or the LTTE.

Indeed, the challenged provisions' criminalization of speech and imposition of liability on the basis of association with proscribed groups provide independent grounds for affirming the court of appeals' decision.[15] The "training" and "expert advice" provisions criminalize speech on the basis of its content; and the "service" provision reaches speech and association that Congress, trying to avoid First Amendment harm, showed no interest in proscribing. Because these provisions do not meet the tailoring and interest requirements of any applicable First Amendment test, they independently violate the First Amendment.[16]

---

[15] Respondents argued below that the material-support statute as a whole, as well as the specific provisions at issue here, were invalid because they imposed guilt by association, in violation of the First Amendment right of association and the Fifth Amendment principle of individual culpability, and that the provisions at issue were vague on their face The court of appeals rejected those contentions, but respondents have preserved the arguments, and they are independent bases for affirming the injunction at issue here.

[16] The provisions also are substantially overbroad. Rather than restricting their scope to support that furthers terrorist activity,

In addition, all three challenged provisions penalize association, because their penalties are triggered by the identity of the organization with which respondents collaborate. Training the Irish Republican Army in human rights advocacy, for example, is permitted; but the very same training provided to the PKK is a crime. Lobbying in conjunction with the Palestine Liberation Organization is permissible; but doing so in conjunction with the PKK is not. A law barring the provision of services to the Kiwanis Club, but prohibiting the same services if provided to the Rotary Club, would readily be seen as a penalty on association. That the targeted groups here are labeled "terrorist" does not alter the fact that the trigger for the criminal penalty is not the nature of the underlying training, advice, or service, but the nature of the *association*. As such, like the public accommodations law in *Dale*, the provisions at issue here directly penalize association, and can withstand constitutional challenge only if they are narrowly tailored to serve a compelling interest – which they are not.[17]

---

they sweep within their ambit a substantial amount of political speech, advocacy, and association having no nexus whatsoever to terrorism. *See Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The government contends that the court "confused the vagueness and overbreadth doctrines." Pet. 18-19. But this misreads the court of appeals' opinion. The court merely noted, in finding the terms vague, that they could conceivably encompass a broad range of constitutionally protected speech. Pet. App. 22a, 24a, 25a. This was perfectly appropriate, because whether a statute potentially criminalizes speech is "the most important factor" affecting vagueness analysis. *Village of Hoffman Estates*, 455 U.S. at 499.

C. The Government's Proposed Statutory Construction Conflicts with the Statute's Plain Language, and Would Not Cure the Provisions' Infirmities

Finally, the government is wrong that the challenged provisions could have been saved by interpreting them *not to* apply to "independent advocacy." Pet. 21. While courts are obliged to construe ambiguous statutes to avoid constitutional questions, they can do so "only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain v. Pressley*, 430 U.S. 372, 378-79 n.11 (1977). Here, the government's proposed construction is not "fairly possible," and in any event would not cure the constitutional defect.

It is not "fairly possible" because Congress specifically addressed the scope of an exception for "independent advocacy," and chose to make "entirely independent" advocacy a safe harbor *only* from the specific prohibition on "personnel," and *not* from any of the statute's other prohibitions. 18 U.S.C. § 2339B(h). To read the statute as containing a general

---

[17] This Court has repeatedly held that association-based penalties must be restricted to association that is intended to further the unlawful ends of the group. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *United States v. Robel*, 389 U.S. 258, 262 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

"independent advocacy" exception would disregard Congress's choice to limit that exception to one particular provision.

If the government wishes to rewrite the statute, it should approach Congress, not this Court. The court of appeals' narrow ruling invites such congressional reconsideration. It is not too much to ask Congress to engage in that process, given the importance of the constitutional rights at stake – rights that, as the government has argued and Congress has declared, Congress sought to respect.

In any event, the government's proposed construction would not save the statute. For one thing, the government's notion of "independent advocacy" would not seem to cover speaking *to* members of the organization, as respondents proposed to do here. That is enough to make the government's proposal not a "saving" construction. And even when the audience is outside the organization, activities such as writing, speaking, and teaching do not lose their First Amendment protection when done in coordination with others. Newspaper reporters, for example, do not forfeit their First Amendment rights because they write under the direction of their editors.

Finally, the government's proposed construction would not clarify the provisions' vagueness. Citizens would still have to guess at whether their activities were entirely "independent," or involved "some collaboration or other relationship between the giver and the recipient." Pet. 22. Would checking facts with a PKK official on a human rights complaint constitute a "collaboration or other relationship" warranting criminal sanctions? Virtually any effort to communicate with a designated group regarding one's advocacy could be viewed as forfeiting independence and entering a "collaboration or other relationship." The government's proposed "construction" would only further muddy the waters.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be denied.

Dated: July 6, 2009

Respectfully submitted,

DAVID D. COLE
Counsel of Record for Respondents
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

SHAYANA KADIDAL
JULES LOBEL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

PAUL HOFFMAN
Schonbrun, De Simone, Seplow, Harris and Hoffman LLP
723 Ocean Front Walk

Venice, California 90291
(310) 396-0731

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, California 90401
(310) 393-3055

VISUVANATHAN
RUDRAKUMARAN
875 Avenue of the Americas
New York, New York 10001
(212) 290-2925

COUNSEL FOR RESPONDENTS

REPLY
BRIEF

No. 08-1498

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. This Court's review is warranted because the court of appeals invalidated an important Act of Congress 2

B. The court of appeals erred in holding the material-support statute unconstitutionally vague 5

1. The statutory terms are not vague 5
2. The court of appeals confused the vagueness and overbreadth doctrines 8
3. The material-support statute does not violate the First Amendment 9

TABLE OF AUTHORITIES

Cases:

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382 (1950) 6

Boy Scouts of Am. v. *Dale*, 530 U.S. 640 (2000) 10, 11

Daubert v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993) 6

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 6

Hill v. *Colorado*, 530 U.S. 703 (2000) 10

Humanitarian Law Project v. *Reno*, 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001) 9

Jones v. *United States*, 526 U.S. 227 (1999) 8

Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 3

Cases—Continued: Page

United States v. *Hammoud*, 381 F.3d 316 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (2005) 9

United States v. *O'Brien*, 391 U.S. 367 (1968) 9

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 6

Constitution, statutes and rule:

U.S. Const.:

Amend. I 2, 8, 9, 11

Amend. V (Due Process Clause) 15

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762 5

8 U.S.C. 1189(a)(1) 10

18 U.S.C. 2339A(b)(2) 5

18 U.S.C. 2339A(b)(3) 6

18 U.S.C. 2339B 1, 3, 4, 11

Fed. R. of Evid. 702 6

Miscellaneous:

Webster's Third New International Dictionary of the English Language (1993) 5, 7

In the Supreme Court of the United States

No. 08-1498

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL., PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR PETITIONERS

The decision of the court of appeals warrants this Court's review because it declares portions of an Act of Congress unconstitutionally vague under the Fifth Amendment. Respondents attempt to minimize the significance of the decision by pointing out that Congress could enact a new statute, but the question warranting review is whether the statute that Congress actually enacted is constitutional.

Review is particularly appropriate here because the statute at issue, 18 U.S.C. 2339B, which prohibits the knowing provision of material support to designated foreign terrorist organizations, is a vital part of the Nation's effort to fight international terrorism. Respondents suggest that the decision below creates only a limited exception to the statute, but the injunction in this case in fact sweeps broadly. It bars any prosecution based on the provision of *any* form of "training," "expert advice or assistance" derived from "specialized knowledge," or "service" to the terrorist groups respondents wish to aid. If others wishing to aid terrorist groups sought similar injunctions, prosecutions based on these important components of the material-support statute—such as the indictments listed in the government's petition (at 11)—would become impossible. That result warrants correction by this Court.

Respondents' efforts to defend the merits of the decision below fare little better. The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. In fact, each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Respondents suggest various hypothetical situations in which the application of the statutory terms might be unclear, but they cannot show any vagueness in the application of the statute to their own proposed conduct.

Finally, respondents repeat the error of the court of appeals when they suggest that the terms at issue are vague because they could be construed to prohibit speech that is protected by the First Amendment. That argument rests on a confusion between the vagueness and overbreadth doctrines. In any event, the statute in question regulates conduct, not speech, and does not violate the First Amendment.

A. This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Important Act Of Congress

As explained in the petition (at 10), this Court normally reviews lower-court decisions holding a federal law unconstitutional, even in the absence of a circuit conflict. Review is likewise warranted here.

1. Contrary to respondents' contention (Br. in Opp. 11-13), the usual presumption in favor of review when a lower court holds a federal statute unconstitutional applies when a court invalidates statutory terms on grounds of vagueness. See, *e.g.*, *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513 (1994). Respondents assert (Br. in Opp. 15-16) that this Court's review is unwarranted when a federal statute is invalidated for this reason because Congress could amend the statute to make it clearer. But Congress can always amend federal laws that are held unconstitutional. The question warranting this Court's review is whether the statute as currently enacted is constitutional. That Congress might someday enact a different statute does not diminish the importance of the lower court's holding that the statute is invalid.

Respondents' own suggestion for making the statute clearer in fact would deprive it of much of its force. Respondents recommend (Br. in Opp. 16) that the statutory prohibition be rewritten to reach only support for specifically enumerated terrorist techniques. Such an amendment would leave unaddressed any novel or unanticipated techniques that might be used in the future. And it would do nothing to accomplish Congress's stated objective of prohibiting *any* material support to terrorist groups—whether for legal or illegal activities—because all support to such groups ultimately facilitates terrorism, even if only by freeing resources that can be devoted to violent ends. See Pet. 11-12.

2. Respondents make little effort to dispute the importance of Section 2339B generally to the Nation's fight against international terrorism. Instead, they ar-

gue (Br. in Opp. 12, 14) that the decision below prevents application of the section only to the "limited activities" in which these particular respondents wish to engage. In fact, the injunction prohibits the government "from enforcing 18 U.S.C. § 2339B's prohibition on providing 'training'; 'expert advice or assistance' in the form of 'specialized knowledge'; or 'service' to the [Kurdistan Workers' Party (PKK)] or the [Liberation Tigers of Tamil Eelam (LTTE)] against any of the named [respondents] or their members." Pet. App. 75a-76a. The injunction on its face therefore enables respondents—who have hundreds of members, see C.A. E.R. 4-6—to provide *any* kind of training, expert advice or assistance, or service to designated terrorist groups. The injunction is not limited to the specific types of aid that respondents claim they wish to provide, nor is it limited (Br. in Opp. 14) to what they term "pure speech." Instead, the injunction would include, among other things, "training" in military tactics, "expert advice" in making bombs, and the "service" of transporting weapons, all to facilitate terrorism.

Moreover, under the decision below, any other, similar membership organization in the Ninth Circuit presumably could secure an equivalent injunction permitting its members to provide training, service, or expert advice or assistance to terrorist groups. The sweep of the decision below will not be confined only to respondents, but will extend to any organizations that allege similar goals. This Court's review need not be postponed until after the statute's prohibitions have been so far eroded; the Ninth Circuit's invalidation of crucial provisions of Section 2339B warrants correction now.

B. The Court of Appeals Erred In Holding The Material-Support Statute Unconstitutionally Vague

1. The statutory terms are not vague

As explained in the petition (at 13-18), the challenged statutory terms—"training," "expert advice or assistance," and "service"—are not unconstitutionally vague. Respondents' arguments to the contrary lack merit.

a. Even before Congress amended and clarified the meaning of "training," in 2004, see Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, the term was sufficiently clear to satisfy the Due Process Clause. "Train" is defined as "to teach or exercise (someone) in an art, profession, trade, or occupation" or to "give instruction to," *Webster's Third New International Dictionary of the English Language* 2424 (1993) (*Webster's*), and a person of ordinary intelligence would easily understand what it means to teach or instruct members of a terrorist organization. As amended by IRTPA, the statute further clarifies that "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). That definition is clear on its face: in real-world situations, a person of ordinary intelligence can distinguish between what is commonly or generally known and what is a skill possessed by a relative few.

Respondents counter (Br. in Opp. 18) with various hypotheticals about teaching geography. But respondents' desired conduct, none of which involves teaching geography, Pet. App. 5a n.1, constitutes "training" within both the ordinary meaning and the statutory definition of the term. Because the law is clear as it applies to respondents' conduct, their vagueness challenge must fail, whether or not the statute might be vague in other, hypothetical situations. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

More broadly, respondents' arguments (Br. in Opp. 18, 19, 21-22), demonstrate only that under this statute, as under any statute, "imagination can conjure up hypothetical cases" in which there is uncertainty. *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950). Respondents have not come close to showing that the statute fails to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

b. As the petition explained (at 15-17), the ordinary dictionary definitions of the words in the statutory phrase "expert advice or assistance" are also well understood, and the statute further clarifies that the phrase means "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), a definition drawn from Federal Rule of Evidence 702. That courts routinely apply Rule 702 belies respondents' assertion (Br. in Opp. 19) that there is no way to distinguish between general and specialized knowledge. If respondents' arguments had force, Rule 702 itself would be hopelessly vague. But it is not. This Court has applied it, as courts every day apply it, based on the ordinary meaning of its words. See *Daubert* v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-590 (1993).

In an effort to blur the commonsense distinction between general and specialized knowledge, respondents observe (Br. in Opp. 19) that all general knowledge was once specialized knowledge and thus in some sense is "derived from" such knowledge. But the statute applies to advice derived from what is *currently* specialized knowledge—not to what is now general knowledge but was specialized knowledge at some point in the past. Conversely, respondents attempt to argue (*ibid.*) that all specialized knowledge "derives from" general knowledge. That line of reasoning, whatever its metaphysical validity, conflates two phrases that any ordinary person would understand as opposed to each other—and in the process implies that "expert advice or assistance" derived from specialized knowledge is a null set, an interpretation as contrary to ordinary rules of statutory construction as to common sense.

c. Finally, the term "service" is not unconstitutionally vague. "Service" means "an act done for the benefit or at the command of another." *Webster's* 2075. As noted in the government's petition (at 17-18), lower courts have found the same or similar terms to be sufficiently clear in other contexts.

Respondents contend (Br. in Opp. 20-21) that the term "service" makes the statute "more confusing" because it could cover support not prohibited by other statutory terms such as "training," "expert advice or assistance," or "personnel." That argument lacks merit. That one statutory provision might reach conduct that another statutory provision does not—in other words, that one statutory provision is broader than another—sheds no light on whether either provision is vague. Like the court below, Pet. 18-19, respondents confuse the separate and distinct concepts of the statute's breadth and the statute's clarity.

Respondents also assert (Br. in Opp. 21-22) that the term "service" is vague because it fails to cordon off independent advocacy from the provision of assistance to terrorists. But as noted in the petition (at 22), a natural reading of the word "service" as "an act done * * * at the command of another" draws precisely this distinction. Like the court of appeals, respondents go out of their way to create, rather than avoid, possible constitutional problems. But see *Jones* v. *United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal quotation marks and citation omitted).

2. *The court of appeals confused the vagueness and overbreadth doctrines*

The court of appeals' vagueness holding was based in large part on the notion that the challenged statutory terms could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a; see also *id.* at 24a-25a. As noted in the petition (at 18-19), that analysis confuses vagueness with overbreadth. Whether the statute violates the First Amendment in any of its applications is distinct from the question whether the statute is unconstitutionally vague.

Respondents attempt to defend the reasoning of the court of appeals by suggesting (Br. in Opp. 27 n.16) that the court simply applied a heightened vagueness standard for statutes that potentially reach protected speech. That is incorrect. The court of appeals expressly held that "[e]ven if persons of ordinary intelligence could discern" the meaning of the term "training," the court nevertheless would "hold that the term 'training' would remain impermissibly vague" because it "could still be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. So even if the challenged terms were perfectly clear, said the court of appeals, it would still find them vague because they might reach protected First Amendment activities. There is no support in this Court's cases for holding that a fully intelligible statute can be voided *on vagueness grounds* because it encompasses some protected First Amendment speech.

3. The material-support statute does not violate the First Amendment

a. As explained in the petition (at 19-21), the material-support statute does not violate the First Amendment in any of its applications. The statute is not aimed at speech, but at conduct—namely, the provision of aid to terrorist groups. Because it regulates conduct and only incidentally restricts speech, the statute is subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). And the statute passes this scrutiny: it promotes an important governmental interest; it is aimed at stopping aid to terrorists, rather than suppressing free expression; and it is reasonably tailored, especially considering the latitude afforded to the government in areas touching upon foreign-policy considerations. Pet. 20; see Pet. App. 28a; *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1135-1136 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *United States* v. *Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (2005).

Contrary to respondents' argument (Br. in Opp. 24), the First Amendment analysis is not altered because the statute prohibits "training" and "expert advice," which usually are accomplished through the use of words. Bribery is accomplished through words; so too extortion. The prohibition on material support to terrorists that consists of training and expert advice is no more constitutionally problematic. As respondents admit, the relevant question in determining whether the *O'Brien* standard applies is whether the statute incidentally restricts speech or instead targets speech because of its content. See *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000). For the reasons stated in the petition (at 19-21), the material-support statute, in prohibiting aid to terrorist organizations, does only the former; that some such aid involves the use of language does not change the analysis.

b. Respondents' assertion (Br. in Opp. 27) that the statute unconstitutionally penalizes constitutionally protected "association" is meritless. The statute prohibits the provision of material support, including training, expert advice or assistance, or service, to terrorist organizations. Respondents' hypotheticals about the Kiwanis and the Rotary Clubs notwithstanding, these terrorist organizations are not designated because of their beliefs or expression, but because the Secretary of State finds that they "engage[] in terrorist activity" that threatens "national security." 8 U.S.C. 1189(a)(1). The designation of these groups and the prohibition of material support to them is reasonably tailored to an important governmental interest unrelated to free expression. No associational rights stand in the way of such legislation.

Respondents' reliance (Br. in Opp. 25-26) on *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000), is misplaced. The Court determined that the Boy Scouts was "an expressive association," and that by forbidding its exclusion of gays and lesbians from membership, the statute at issue in that case would "significantly affect its expression." *Id.* at 656. Accordingly, the Court concluded that the statute "directly and immediately affect[ed] associational rights," making the *O'Brien* standard inapplicable. *Id.* at 659. The material-support statute, by contrast, is not aimed at regulating the membership of any organization, expressive or otherwise. Nor does the statute compel any organization to convey a message at odds with its fundamental beliefs, as the Court found the statute in *Dale* to do. See *id.* at 653-654. The statute prohibits only the provision of aid to terrorists, and to the extent it restricts speech, it does so only incidentally.

c. Even if Section 2339B has unconstitutional applications, they are insufficiently substantial, either in absolute number or in relation to the statute's plainly legitimate sweep, to render the statute unconstitutionally overbroad. Even the court below recognized this point in another part of its analysis, Pet. App. 27a-29a, and respondents make almost no effort to argue to the contrary. Their sole argument (Br. in Opp. 26-27 n.16) appears to proceed on the premise that heightened scrutiny applies to the statute. For the reasons explained above, however, that analysis is flawed. The statute at issue here regulates conduct, divorced from any relation to the content of expression; and the vast majority of its applications do not even arguably implicate the First Amendment.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
JUL 6 - 2009
OFFICE OF THE CLERK

No. 08-1498

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., Attorney General, *et al.*,
Petitioners,

v.

HUMANITARIAN LAW PROJECT, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF JAMES J. CAREY, Rear Adm., USN (Ret.), STEVEN B. KANTROWITZ, Rear Adm., USN (Ret.), THOMAS L. HEMINGWAY, Brig. Gen., USAF (Ret.), WASHINGTON LEGAL FOUNDATION, NATIONAL DEFENSE COMMITTEE, and ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: July 6, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether 18 U.S.C. § 2339B(a)(1), which prohibits the knowing provision of "any . . . service, . . . training, [or] expert advice or assistance," 18 U.S.C. § 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

I. THE APPEALS COURT HAS OPENED THE DOOR TO ACTIVITIES THAT CONGRESS HAS DETERMINED POSE A THREAT TO VITAL AMERICAN INTERESTS 10

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S INCORPORATION OF FIRST AMENDMENT LAW INTO ITS VAGUENESS ANALYSIS CONFLICTS WITH THIS COURT'S CASE LAW 13

III. REVIEW IS WARRANTED BECAUSE THE APPEALS COURT ADOPTED AN OVERLY BROAD UNDERSTANDING OF THE VOID-FOR-VAGUENESS DOCTRINE. 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Foti v. City of Menlo Park,
146 F.3d 629 (9th Cir. 1998) 15

Grayned v. City of Rockford,
408 U.S. 104 (1972) 14, 20

Gustavson v. Alloyd Co.,
513 U.S. 561 (1995) 20

Hill v. Colorado,
530 U.S. 703) 14

Kolender v. Lawson,
461 U.S. 352 (1983) 14

Statutes and Constitutional Provisions:

U.S. Const., amend i 9

U.S. Const., amend v 4, 9

8 U.S.C. § 1189(a)(1) 4, 10

18 U.S.C. § 2339A 12, 18
18 U.S.C. § 2339A(b) 5
18 U.S.C. § 2339A(b)(1) 5, 9, 13, 15, 16, 17, 20
18 U.S.C. § 2339A(b)(2) 6, 16, 17
18 U.S.C. § 2339A(b)(3) 7, 16, 17

Page(s)

18 U.S.C. § 2339B 5, 12, 19
18 U.S.C. § 2339B(a) 8
18 U.S.C. § 2339B(a)(1) 4, 5, 16, 18
18 U.S.C. § 2339B(h) 17
18 U.S.C. § 2339B(a)(1) . . . .

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note* 8

Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 . . . . 5, 6

Miscellaneous:

Department of State, Office of the Coordinator for Counterterrorism, *Country Report on Terrorism 2008*, Chapter 6, "Terrorist Organizations," available at http://www.state.gov/s/ct/rls/crt/2008/122449.htm (last visited June 30, 2009) 11

Testimony of Deputy Ass't Attorney General Gregory Katsas, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (May 10, 2005) 12

153 Cong. Rec. S15876 (2007) 12

BRIEF OF JAMES J. CAREY, Rear Adm., USN (Ret.),
STEVEN B. KANTROWITZ, Rear Adm., USN (Ret.),
THOMAS L. HEMINGWAY, Brig. Gen., USAF (Ret.),
WASHINGTON LEGAL FOUNDATION,
NATIONAL DEFENSE COMMITTEE, and
ALLIED EDUCATIONAL FOUNDATION
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

Amici curiae are three individuals who are retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the election of more veterans to the U.S. Congress.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties have consented to this filing; letters of consent have been lodged with the Court.

U.S. Navy from September 1974 through January 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the Judge Advocate General of the Navy. At the time of his selection to flag rank, he served as commanding officer of an international and operational law unit. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He had also been an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004). WLF also filed a brief in this matter when it was before the court of appeals.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that the Ninth Circuit's decision, if allowed to stand, could significantly impair the federal government's ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted legislation designed to cut off such support. *Amici* believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support for such groups, regardless of the form in which that support is given. *Amici* further believe that Congress has spoken with sufficient clarity to make clear to a person of ordinary intelligence the scope of the prohibition: Congress has prohibited virtually all support for foreign terrorist groups.

STATEMENT OF THE CASE

Congress has authorized the Secretary of State to designate an organization as a "foreign terrorist organization" if, *inter alia,* the organization engages in terrorist activity and that activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). If an organization has been so designated, it is a serious criminal offense to "knowingly provide material support or resources" to the organization. 18 U.S.C. § 2339B(a)(1).

Among the organizations that the Secretary of State has designated as foreign terrorist organizations are the Kurdistan Workers Party ("Partiya Karkeran Kurdistan" or "PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Despite that designation, Respondents (six organizations and two U.S. citizens) seek to provide material support to those terrorist groups. Plaintiffs contend that they do not seek to support the PKK's and the LTTE's terrorist activities; rather, they assert a desire to provide material support for the groups' lawful humanitarian and political activities. They filed two suits in U.S. District Court for the Central District of California, seeking to enjoin the federal government from initiating criminal proceedings against them for providing such support. The suits alleged, *inter alia,* that several of the statutory terms used to define what constitutes the provision of "material support or resources" – including "training," "expert advice or assistance," "service," and "personnel" – are impermissibly vague, in violation of the Fifth Amendment, because they fail to provide people of ordinary intelligence with a clear understanding of what activities are impermissible.

As set forth in detail in the Petition, the cases have a lengthy procedural history – including three separate appeals to the Ninth Circuit. In December 2004, Congress adopted the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638, which amended several of the statutory provisions challenged by Respondents. Following adoption of IRTPA, the appeals court vacated an earlier injunction issued by the district court against enforcement of portions of § 2339B, and remanded the case to the district court for reconsideration of light of the IRTPA amendments.

On remand, the district court consolidated the two cases and largely duplicated its prior rulings in the case. Pet. App. 33a-76a. It held that three of four challenged statutory terms were impermissibly vague: "training," "expert advice or assistance," and "service."[2] It held that the 2004 IRTPA amendments failed to cure the vagueness concerns expressed by the court in prior decisions with respect to the first two terms, and that "service," a term added for the first time by IRTPA, suffered from similar vagueness problems. *Id.* at 60a-68a. It denied a vagueness challenge to a fourth statutory term: "personnel." It held that IRTPA had cured the previously identified deficiencies in the definition of "personnel" by providing "fair notice" of the prohibited conduct:

---

[2] *See* 18 U.S.C. § 2339A(b). The challenged terms are among a laundry list of items included within the definition of "material support or resources," 18 U.S.C. § 2339A(b)(1), the provision of which to a foreign terrorist organization is made subject to criminal sanction by 18 U.S.C. § 2339B(a)(1).

> Limiting the provision of personnel to those working under the "direction or control" of a foreign terrorist organization or actually managing or supervising a foreign terrorist organization operation sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct.

Id. at 69a.

The Ninth Circuit affirmed. *Id.* at 1a-32a. It held that the term "training" (defined under IRTPA as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. § 2339A(b)(2)) was impermissibly vague because a person of ordinary intelligence would not know whether the conduct contemplated by Respondents constituted "training" and thus the unlawful provision of "material support." *Id.* at 21a-23a.[3] The court also held that even if a person of ordinary intelligence could differentiate between instruction that imparts a "specific skill" and instruction that imparts "general knowledge," it would still be unconstitutionally vague because, as so defined, "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a.

---

[3] The court held that a person of ordinary intelligence would not know whether the following contemplated conduct was prohibited: "teaching someone to petition international bodies for tsunami related aid" and "instruct[ing] members of a designated group on how to petition the United Nations to give aid to their group." *Id.* at 21a-22a.

The appeals court held that the term "expert advice or assistance" (defined under IRTPA as advice or assistance derived from "scientific, technical, or other specialized knowledge," 18 U.S.C. § 2339A(b)(3)) was impermissibly vague, at least with respect to the "other specialized knowledge" portion of the ban. *Id.* at 24a. The court held that that portion of the ban is void for vagueness because it: (1) is not "reasonably understandable to a person of ordinary intelligence"; and (2) "continues to cover constitutionally protected advocacy." *Id.*

The appeals court adopted the holding and reasoning of the district court regarding the term "service." It stated that the term encompasses both "training" and "expert advice or assistance" and thus is constitutionally flawed for the same reasons that those other terms are flawed: a person of ordinary intelligence would not know whether his contemplated conduct constitutes "service," and "'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'" *Id.* at 25a (quoting district court decision, *id.* at 67a).

The appeals court affirmed the district court's rejection of Respondents' void-for-vagueness challenge to the term "personnel." *Id.* at 26a-27a. The court also affirmed the district court's rejection of Respondents' First Amendment overbreadth challenge to the terms "training," "expert advice and assistance," "service," and "personnel." The court stated that while

Respondents "may be able to identify particular instances of protected speech that may fall within the statute," those instances "are not substantial" when compared to the many legitimate applications of § 2339B(a), and thus the statute is not overbroad. *Id.* at 29a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Congress has determined that international terrorism "threatens the vital interests of the United States" and that *any* support of terrorist groups facilitates that terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. Accordingly, Congress has determined that national security requires that direct material support to groups determined by the federal government to be foreign terrorist organizations be prohibited. *Id.*

The Ninth Circuit's decision directly undercuts that congressional determination. By striking down portions of the ban on support of foreign terrorist organizations, the court has opened the door to activities that, Congress has determined, pose a threat to vital American interests. Review is warranted to determine whether, as the Ninth Circuit indicated, the Constitution prohibits the federal government from taking the steps that Congress has determined are necessary to protect national security.

Review is also warranted because the Ninth

Circuit arrived at its result only after incorporating large swaths of First Amendment law into its Fifth Amendment void-for-vagueness analysis. The Ninth Circuit held that even if a person of ordinary intelligence would understand what activities are prohibited by the challenged language of § 2339A(b)(1), that language is void for vagueness if the prohibited activities could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. That holding directly conflicts with numerous decisions of this Court, which hold that a statute is impermissibly vague (thereby violating due process rights) only if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) defines a criminal offense with insufficient definiteness such that it encourages arbitrary and discriminatory enforcement. While the void-for-vagueness doctrine often serves First Amendment values by ensuring that uncertainty regarding the scope of a statute does not end up chilling constitutionally protected speech, the Court has never held that a clearly-written statute can be struck down on vagueness grounds merely because it could be read to encompass speech and advocacy protected by the First Amendment.

Review is also warranted because the appeals court adopted an overly broad understanding of the void-for-vagueness doctrine. Because no set of words will convey precisely the same meaning to all people, legislation – in order to survive a vagueness challenge – need do no more than make clear what the law *as a whole* prohibits. Instead of undertaking such a holistic approach, the appeals court picked out several components of Congress's comprehensive definition of what it means to "knowingly provide material support or resources" and faulted those individual components for being insufficiently precise. Review is warranted to determine whether the Ninth Circuit's piece-by-piece approach to void-for-vagueness analysis is consistent with this Court's case law.

I. THE APPEALS COURT HAS OPENED THE DOOR TO ACTIVITIES THAT CONGRESS HAS DETERMINED POSE A THREAT TO VITAL AMERICAN INTERESTS

Congress has authorized the Secretary of State to designate an organization as a "foreign terrorist organization" if, *inter alia,* the organization engages in terrorist activity and that activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). Among the organizations that the Secretary of State has designated as foreign terrorist organizations (FTOs)are the PKK and the LTTE, the two organizations to which Respondents seek to provide support. As a result of the Ninth Circuit's decision striking down portions of a federal statute, the federal government may not prevent Respondents from providing material support to the PKK or the LTTE in the form of "training," expert advice or assistance that is based on "other specialized knowledge,"[4] or "services" - despite Congress's determination that *any* support of FTOs facilitates international terrorism and thus threatens the vital interests of the United States.

---

[4] That is, specialized knowledge that is neither "scientific" knowledge nor "technical" knowledge.

Review is warranted in light of the importance of the decision to national security interests. The decision below not only permits Respondents to provide material support to two FTOs; it also effectively permits others living within the Ninth Circuit to provide similar support to the other 42 terrorist organizations that have been designated FTOs by the Secretary of State.

Among those other 42 FTOs are such well-known groups as al-Qaeda, HAMAS, and Hizballah.[5] Few need to be reminded of al-Qaeda's murderous history. In the years since it masterminded the 9/11 attacks in the United States that killed 3,000 people, its operations have included a series of attacks in Saudi Arabia in 2003-04 that killed more than 90 people, including 14 Americans; a suicide bombing at a hotel in Kenya that killed 15; and November 2003 attacks in Istanbul that killed more than 60 people. It is also believed to have financed the October 2002 bombings in Bali, Indonesia that killed more than 200 and to have been involved in the July 2005 bomb attacks on the London public transportation system.

HAMAS has been involved throughout the past decade in numerous attacks on the civilian population of Israel, America's close ally. In June 2007, it took control of Gaza from the Palestinian Authority in a military-style coup, leading to an international boycott and closure of Gaza's borders. Hizballah's violent history includes the suicide truck bombings of the U.S. Embassy and U.S. Marine barracks in Beirut.

---

[5] Information included herein regarding these three FTOs is taken from a State Department report. *See* Department of State, Office of the Coordinator for Counterterrorism, *Country Report on Terrorism 2008*, Chapter 6, "Terrorist Organizations," available at http://www.state.gov/s/ct/rls/crt/2008/122449.htm (last visited June 30, 2009).

Unless the Ninth Circuit's decision is reversed, the ability of the federal government to prosecute those who supply training, specialized knowledge, and/or services to these three groups and other FTOs will be severely impaired. Yet, supplying those resources strengthens the groups and thereby undermines U.S. interests, regardless whether those who do the supplying intend to limit their support to an FTO's "humanitarian" projects. As U.S. Senator John Kyle recently explained, "There is no such thing as 'good' aid to a terrorist organization, because all aid is fungible and can be converted to evil purposes, and because even humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 Cong. Rec. S15876 (2007).

The Justice Department has determined that the "material support statutes" (18 U.S.C. §§ 2239A and 2239B) are "critical features of law enforcement's current approach to counterterrorism." Testimony of Deputy Assistant Attorney General Gregory Katsas, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (May 10, 2005). Targeting those who provide the logistical support for terrorist groups – whether in the form of cash, materials, or services – is critical because "[p]eople who perform these services and fill these positions may not be bomb-throwers. But the frontline terrorists cannot operate without their supporters and their logistical support networks." *Id.* The Petition documents repeated instances in which the Justice Department has prosecuted individuals under the material support statutes for providing "training," "specialized knowledge," and "services" to FTOs – the very provisions that the Ninth Circuit struck down as unconstitutionally vague. Review is warranted in light of the significant impact that the Ninth Circuit's decision is having on enforcement of statutes that the federal government deems critical to counterterrorism efforts.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S INCORPORATION OF FIRST AMENDMENT LAW INTO ITS VAGUENESS ANALYSIS CONFLICTS WITH THIS COURT'S CASE LAW

Review is also warranted because the Ninth Circuit arrived at its result only after incorporating large swaths of First Amendment law into its Fifth Amendment void-for-vagueness analysis. The Ninth Circuit held that even if a person of ordinary intelligence would understand what activities are prohibited by the challenged language of § 2339A(b)(1), that language is void for vagueness if the prohibited activities could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. The appeals court then proceeded to invoke this could-be-read-to-encompass-speech-and-advocacy doctrine as a basis for declaring "training," "other specialized knowledge," and "service" impermissibly vague. *Id.* at 22a, 24a, 25a.

That holding directly conflicts with numerous decisions of this Court, which hold that a statute is impermissibly vague (thereby violating due process rights) only if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) defines a criminal offense with insufficient definiteness such that it encourages arbitrary and discriminatory enforcement. *See, e.g., Hill v. Colorado,* 530 U.S. 703, 732 (2000); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Ninth Circuit cited no opinions from this Court in support of its assertion that the could-be-read-to-encompass-speech-and-advocacy doctrine provides a third basis for striking down a statute on vagueness grounds.

The district court sought support for that doctrine in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Pet. App. 61a. That citation was inapposite. The Court observed in *Grayned* that the vagueness doctrine is particularly important when the challenged statute is one that regulates speech, because the effect when such a statute is vague is to chill the speech (even fully protected speech) of those who are unsure whether their speech offends the statute. But the Court ultimately upheld the city ordinance at issue in *Grayned* after scrutinizing it under the two tests traditionally applied in determining whether a law is impermissibly vague: whether it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, and whether it defines a criminal offense with insufficient definiteness such that it encourages arbitrary and discriminatory enforcement. *Grayned,* 408 U.S. at 109. The Court made no mention of a separate could-be-read-to-encompass-speech-and-advocacy doctrine in upholding the ordinance. *Id.* at 108-09.

Nor can the Ninth Circuit's adoption of the doctrine in this case be dismissed as an aberration that is unlikely to repeat itself in future cases. Rather, the Ninth Circuit (both in the decision under review and in an earlier, 2000 panel decision in this case) made clear that in adopting the doctrine it was following well-established Ninth Circuit precedent. Pet. App. 19a-20a (citing ***Foti v. City of Menlo Park***, 146 F.3d 629 (9th Cir. 1998). Review is warranted to resolve the conflict between this Court's decisions and Ninth Circuit case law regarding whether clearly-written statutes are subject to invalidation under the void-for-vagueness doctrine when they impose restrictions on fully protected speech.

III. REVIEW IS WARRANTED BECAUSE THE APPEALS COURT ADOPTED AN OVERLY BROAD UNDERSTANDING OF THE VOID-FOR-VAGUENESS DOCTRINE

The Court has made clear that because no set of words will convey precisely the same meaning to all people, legislation – in order to survive a vagueness challenge – need do no more than make "clear what the law *as a whole* prohibits." *Grayned*, 408 U.S. at 110. Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.* Thus, a court employing this Court's holistic approach when considering a void-for-vagueness challenge to the material support statutes would look to the entire definition of "material support or resources" set forth in 18 U.S.C. § 2339A(b)(1) in determining whether the statute provides a person of ordinary intelligence with sufficient guidance regarding what constitutes "material support or resources."[6]

The Ninth Circuit adopted a sharply conflicting approach: it examined one-by-one the various components of §2339A(b)(1)'s definition of "material support or resources." Review is warranted to resolve the conflict between this Court's approach to vagueness doctrine and the approach adopted by the Ninth Circuit, particularly because those two approaches lead to such radically different results.

When considered as a whole, the language employed by Congress in prohibiting significant direct support for designated "foreign terrorist groups" easily meets the standard vagueness test – whether it provides a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

Section 2339B(a)(1) prohibits "knowingly" providing "material support or resources" to a foreign terrorist organization. "Material support or resources" in turn is defined as meaning:

---

[6] Section 2339A(b)(1) provides 22 separate examples of items included within the definition of "material support or resources," including "training," "expert advice or assistance," and "service." "Training" and "expert advice or assistance" are further defined in § 2339A(b)(2) & (b)(3). In addition, several of the items identified in § 2339A(b)(1) are clearly intended as examples of the types of "service" included within the definition of "material support or resources." Section 2339A(b)(1) goes on to identify two types of property not included within that definition: "medicine" and "religious materials."

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documents or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1). "Training" is further defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). "Expert advice or assistance" is further defined to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). "Personnel" is further defined to make clear that one cannot be deemed to have provided "personnel" if the individuals involved work "independently of the foreign terrorist organization to advance its goals or objectives" and not under the organization's "direction and control." 18 U.S.C. § 2339B(h).

In view of the comprehensive nature of the definition of "material support or resources" contained in § 2339A(b)(1), Congress's overall intent is readily apparent to people of ordinary intelligence: Congress intended to prohibit virtually *all* direct significant support for designated foreign terrorist organizations. Given the overall tenor of the statute, Respondents' challenge to individual components of the definition of "material support or resources" is largely academic.

Included within that definition is *any* "property" or "service"; the words that follow serve merely to flesh out the many and varied types of property and service that Congress had in mind. The appeals court indicated that Respondents do not have a good idea regarding the types of "training" they may provide. But since virtually any activity that might be deemed "training" performed under the auspices of a foreign terrorist organization would also be a "service," all such activity is banned. Similarly, the ban on "advice or assistance derived from scientific, technical or other specialized knowledge" is crystal clear: while casual advice is not banned (*e.g.*, "it looks to me as though it is going to rain today"), the phrase "specialized knowledge," when read in the context of the entire statute, makes clear that *any* type of advice that could have real strategic value to the organization (because it is based on knowledge that is not generally possessed by members of the organization) is banned. That includes such "specialized knowledge" as knowledge of effective methods for lobbying the United Nations.

To the extent that there is any real limit on the ban on direct material assistance, it comes not from the language of § 2339A but from the word "knowingly" in § 2339B(a)(1) and from that statute's requirement that the "material support or resources" be given "to" the foreign terrorist organization. Many of the hypothetical examples put forward by Respondents in the appeals court would not be covered by the ban because, under a common sense reading of § 2339B(a)(1), the support would not be deemed to have been given "to" the organization. For example, Respondents expressed a desire to provide expert advice and training in Tamil language, literature, arts, cultural heritage, and history. Nothing in § 2339B prevents Respondents from doing so, even if some of those receiving the training happen also to be members of the LTTE. Such expert advice and training could not reasonably be deemed to have been provided "to" the LTTE unless the training sessions at issue were being run under the auspices of the LTTE, or the LTTE had arranged for such sessions in order to gain knowledge that would further the goals of the LTTE. Thus, those wishing to impart their knowledge to the Tamil of Sri Lanka (including knowledge regarding international law, tsunami relief, or gaining United Nations support for the Tamil cause) have an easy way of doing so without running afoul of § 2339B: just make sure that one's actions are not being undertaken under the auspices of the LTTE.

Section 2339B's scienter requirement (limiting the statute's reach to those who "knowingly" provide material support to others they know to be terrorist groups or to have been designated as such by the Secretary of State) provides additional assurance that the statute could be applied to those who failed to understand its reach. Of course, Respondents are well aware that the PKK and the LTTE have been designated as terrorist organizations and that § 2339B broadly prohibits providing material support to those groups. Accordingly, there is little reason to be sympathetic to their claims that there may be some hypothetical situations to which § 2339B's application may be unclear. The statute is broad, and its application to the support they wish to provide is clear.

The preceding vagueness analysis – which employs the analyze-the-statute-as-a-whole approach endorsed by this Court in *Grayned* and elsewhere -- conflicts sharply with the vagueness analysis adopted by Ninth Circuit. By focusing on individual terms within Congress's broad definition of "material support or resources," the appeals court claimed to have identified instances in which individuals focusing on that single term would have insufficient guidance regarding whether the material support statutes prohibited their intended conduct. But in many of those instances (as explained above), individuals would have been able to obtain the guidance they claimed to be seeking by reading the entire statute. Indeed, this Court has repeatedly explained that words in a statute often cannot be fully understood unless they are considered in the context of the entire statute in which they appear. *See, e.g., Gustavson v. Alloyd Co.,* 513 U.S. 561, 575 (1995) (applying the maxim *noscitur a sociis* – a word is known by the company it keeps). Review is warranted to resolve the conflict between the approach to vagueness analysis adopted by this Court and the approach adopted by the Ninth Circuit – particularly because the two approaches lead to diametrically opposed results regarding whether portions of §2339A(b)(1) are void for vagueness.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: July 6, 2009

JOINT
APPENDIX

(5) (4)

Supreme Court, U.S.
FILED
NOV 16 2009
OFFICE OF THE CLERK

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

ELENA KAGAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record for
the Attorney General

DAVID D. COLE
c/o Georgetown University
Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9078

Counsel of Record for
Humanitarian Law
Project

DOC 4
TC only
587JCP

PETITIONS FOR WRITS OF CERTIORARI IN NOS. 08-1498 AND 09-89
FILED: JUNE 4, 2009, AND JULY [illegible] 2009
CERTIORARI GRANTED: SEPT. 30, 2009

416A 140

TABLE OF CONTENTS

Page

Docket entries from the United States Court of Appeals for the Ninth Circuit (No. 05-56846) 1

Docket entries from the United States Court of Appeals for the Ninth Circuit (No. 05-56753) 7

Docket entries from the United States District Court for the Central District of California (No. 03-cv-06107) 12

Docket entries from the United States District Court for the Central District of California (No. 98-cv-01971) 25

Complaint (filed Aug. 27, 2003) 44

Complaint (filed Mar. 19, 1998) 67

Declarations of Ralph H. Fertig:

- May 11, 2005 91
- Dec. 7, 2003 101
- Sept. 17, 2003 105
- Mar. 9, 1998 108

Declaration of Kenneth R. McKune (Apr. 21, 1998) 127

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 05-56846

HUMANITARIAN LAW PROJECT; RALPH FERTIG; HANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM,
PLAINTIFFS-APPELLANTS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/04/06	7	Filed original & 15 copies Defs Alberto R. Gonzales et al's first brief on cross-appeal (Informal: n) of 48 pages & 5 Excs.; served on 4/3/06 [05-56753, 05-56846] (GV)

DATE	DOCKET NUMBER	PROCEEDINGS

* * * * *

4/18/06	9	Received Washington Legal Foundation & Allied Educational's amicus curiae brief in original & 15 copies of 28 pages; served on 4/13/06; deficient: (mtn to becm am pending) *************** FOR MERTIS [*sic*] APNEL [*sic*] *********** [05-56753, 05-56846] (GV)

* * * * *

5/16/06	11	Filed original & 15 copies Plas Humanitarian Law, et al' second brief on cross-appeal of 60 pages (Informal: n); 5 Supplemental Excs.; served on 5/15/06 [05-56753, 05-56846] (GV)
5/22/06	12	Received American Civil Liberties, et al's amicus curiae brief in original & 15 copies of 27 pages; served on 5/10/06 deficient: (mtn to becm am pending) ***** FOR MERITS PANEL *************** [05-56753, 05-56846] (GV)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/13/06	16	Filed original & 15 copies Def's third brief on cross-appeal (Informal: n) of 63 pages [13,949 words]; served on 7/12/06 [05-56753, 05-56846] (GV)
		* * * * *
8/16/06	20	Filed original & 15 copies Plas Humanitarian Law's reply brief on cross-appeal (Informal: n) of 23 pages w/yellow covers; served on 8/13/6. Notified csl to submit 16 gray covers. [05-56753, 05-56846] (GV)
8/17/06	21	Filed original and copies reply brief, (Informal: n) of pages; (minor defcy: [05-56753, 05-56846] (GV)
		* * * * *
12/10/07	35	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Harry

DATE	DOCKET NUMBER	PROCEEDINGS
		PREGERSON, author; Sidney R. THOMAS; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. [05-56753, 05-56846] (RT)
1/24/08	36	[6408027] Filed original & 50 copies Defs' petition for panel rehearing and petition for rehearing en banc of 20 pages [4196 words]; served on 1/23/08 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [05-56753, 05-56846] (GV)
3/19/08	37	Filed Plas Humanitarian e. [*sic*] al original and 50 copies response to petition for rehearing enbanc [*sic*] 16 pages. 4149 pages] Served on 03/18/2008. () [05-56753, 05-56846] (GV)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/05/09	39	Filed order and amended opinion (HARRY PREGERSON, SIDNEY R. THOMAS and JOHNNIE B.

DATE	DOCKET NUMBER	PROCEEDINGS
		RAWLINSON). The opinion filed in this case on December 10, 2007, slip op. at 16135, is hereby amended as follows: (See opinion for full text). With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised on these amendments and of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. and no active judge has requested a vot on whether to rehear the matter en banc. (Fed. R. App. P. 35.) Future petitions for panel rehearing and future petitions for rehearing en banc will not be entertained. The petition for panel rehearing and the petition for rehearing en banc are DENIED. [05-56753, 05-56846] (RP)

DATE	DOCKET NUMBER	PROCEEDINGS
1/13/09	40	MANDATE ISSUED. (HP, SRT and JBR) [05-56753, 05-56846] (GV)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 05-56753

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM,
PLAINTIFFS-APPELLEES

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
* * * * *		
4/04/06	13	Filed original & 15 copies Defs Alberto R. Gonzales et al's first brief on cross-appeal (Informal: n) of 48 pages & 5 Excs.; served on 4/3/06 [05-56753, 05-56846] (GV)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/18/06	17	Received Washington Legal Foundation & Allied Educational's amicus curiae brief in original & 15 copies of 28 pages; served on 4/13/06; deficient: (mtn to becm am pending) *************** FOR MERITS [*sic*] APNEL [*sic*] *********** [05-56753, 05-56846] (GV)
		* * * * *
5/16/06	20	Filed original & 15 copies Plas Humanitarian Law, et al' second brief on cross-appeal of 60 pages (Informal: n); 5 Supplemental Excs.; served on 5/15/06 [05-56753, 05-56846] (GV)
5/22/06	26	Received American Civil Liberties, et al's amicus curiae brief in original & 15 copies of 27 pages; served on 5/10/06 deficient: (mtn to becm am pending) *****

DATE	DOCKET NUMBER	PROCEEDINGS
		FOR MERITS PANEL **************** [05-56753, 05-56846] (GV)
	* * * * *	
7/13/06	33	Filed original & 15 copies Def's third brief on cross-appeal (Informal: n) of 63 pages [13,949 words]; served on 7/12/06 [05-56753, 05-56846] (GV)
	* * * * *	
8/16/06	38	Filed original & 15 copies Plas Humanitarian Law's reply brief on cross-appeal (Informal: n) of 23 pages w/yellow covers; served on 8/13/6. Notified csl to submit 16 gray covers. [05-56753, 05-56846] (GV)
	* * * * *	
12/10/07	58	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearings; Affirmed; Written, Signed, Published. Harry PREGERSON, author; Sidney R. THOMAS; Johnnie B.

DATE	DOCKET NUMBER	PROCEEDINGS
		RAWLINSON.) FILED AND ENTERED JUDGMENT. [05-56753, 05-56846] (RT)
1/24/08	61	[6408027] Filed original & 50 copies Defs' petition for panel rehearing and petition for rehearing en banc of 20 pages [4196 words]; served on 1/23/08 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [05-56753, 05-56846] (GV)
	* * * * *	
3/19/08	64	Filed Plas Humanitarian e. [sic] al original and 50 copies response to petition for rehearing en banc 16 pages. 4149 pages] Served on 03/18/2008. () [05-56753, 05-56846] (GV)
1/05/09	65	Field order and amended opinion (HARRY PREGERSON, SIDNEY R. THOMAS and JOHNNIE B. RAWLINSON). The opinion filed in this case on Decem-

DATE	DOCKET NUMBER	PROCEEDINGS
		ber 10, 2007, slip op. at 16135, hereby amended as follows: (See opinion for full text). With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of these amendments and of the petition for rehearing en banc. (Fed. R. App. P. 35.) Future petitions for panel rehearing and future petitions for rehearing en banc will not be entertained. The petition for panel rehearing and the petition for rehearing en banc are DENIED. [05-56753, 05-56846] (RP)
1/13/09	66	MANDATE ISSUED. (HP, SRT and JBR) [05-56753, 05-56846] (GV)

* * * * *

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

Docket No. 2:03-cv-06107-ABC-Mc

HUMANITARIAN LAW PROJECT; RALPH FERTIG;
ILANKAI THAMIL SANGAM; NAGALINGAM
JEYALINGAM; WORLD TAMIL COORDINATING
COMMITTEE; FEDERATION OF TAMIL SANGAMS OF
NORTH AMERICAN; TAMIL WELFARE & HUMAN
RIGHTS COMMITTEE, PLAINTIFFS

v.

JOHN ASHCROFT IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES;
UNITED STATES DEPARTMENT OF JUSTICE; COLIN
POWELL IN HIS OFFICIAL CAPACITY AS UNITED
STATES SECRETARY OF STATE; UNITED STATES
DEPARTMENT OF STATE, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/27/03	1	COMPLAINT filed Summons(es) 60 days issued referred to Discovery James W. McMahon (rrey) (Entered: 08/29/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
10/16/03	7	NOTICE OF MOTION AND MOTION by plaintiff World Tamil for summary judgment; motion hearing set for 10:00 11/24/03 Lodged order and judgment (bg) (Entered: 10/17/2003)
	* * * * *	
11/24/03	11	NOTICE OF MOTION AND MOTION by defendants to dismiss plaintiff's claims; motion hearing set for 12/22/03 at 10:00 (mg) (Entered: 12/01/2003)
	* * * * *	
1/22/04	20	ORDER by Judge Audrey B. Collins: Granting in part and denying in part defendants' 11 Motion to Dismiss as follows: The court grants the motion as it relates to plaintiffs WTTC and FETNA; and the court denies the motion as it relates to plaintiffs HLP, Judge Fertig, Dr. Jeyalingam, Sangam and

DATE	DOCKET NUMBER	PROCEEDINGS
		TWHRC. And granting in part and denying in part plaintiffs' 7 for Summary Judgment as follows: The court grants the motion to the extent the court finds that the term "expert advice or assistance" is impermissibly vague; and the court denies the motion with respect to the remaining arguments raised. Accordingly, defendants are enjoined from enforcing the USA Patriot Act's prohibition on providing "expert advice or assistance" to foreign terrorist organizations against any of the remaining named plaintiffs or their members. The court declines to grant a nationwide injunction. (mg,) (Entered: 01/23/2004)
1/28/04	21	CORRECTED ORDER by Judge Audrey B. Collins: Granting in part and denying in part defendants' 11 Motion to Dismiss as follows: The court grants the motion

DATE	DOCKET NUMBER	PROCEEDINGS
		as it relates to plaintiffs WTTC and FETNA; and the court denies the motion as it relates to plaintiffs HLP, Judge Fertig, Dr. Jeyalingam, Sangam and TWHRC. And granting in part and denying in part plaintiffs' 7 Motion for Summary Judgment as follows: The court grants the motion to the extent the court finds that the term "expert advice or assistance" is impermissibly vague; and the court denies the motion with respect to the remaining arguments raised. Accordingly, defendants are enjoined from enforcing the USA Patriot Act's prohibition on providing "expert advice or assistance" to foreign terrorist organizations against any of the remaining named plaintiffs or their members. The court declines to grant a nationwide injunction. (mg,) (Entered: 01/30/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
2/6/04	22	NOTICE OF MOTION AND MOTION to file Supplemental declarations and amend the judgment filed by Plaintiffs, Federation of Tamil Sangams of North America, Ralph Fertig, Humanitarian Law Project, Nagalingam Jeyalingam, Ilankai Thamil Sangam, Tamil Welfare &Human Rights [*sic*] Committee, World Tamil Coordinating Committee. Motion set for hearing on 3/8/2004 at 10:00 AM before Honorable Audrey B. Collins. Lodged order. (shb,) (Entered: 02/13/2004)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/03/04	28	Order by Judge Audrey B. Collins granting the motion of plaintiffs WTCC and FETNA to file Supplemental declarations regarding standing and amending the judgment 22. The order of dismissal as to these two plaintiffs is reversed and summary judgment is en-

DATE	DOCKET NUMBER	PROCEEDINGS
		tered as to these two plaintiffs as well on their claim that the term "expert advice assistance," as applied to the definition of prohibited "material support" in 805(a)(2)(B) of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) ("USA PATRIOT Act"), codified at 18 USC, 2339A(a) and 2339B(a), is unconstitutionally vague and overbroad. Accordingly, the Corrected order of 1/30/04 is amended to permanently enjoin defendants from enforcing the restriction on providing "material support" in the form of "expert advice and assistance" in the aforesaid provision of the USA PATRIOT Act to plaintiffs WTCC and FETNA. (mg,) (Entered: 03/04/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
3/17/04	30	AMENDED Order by Judge Audrey B. Collins re plaintiffs Motion for Summary Judgment and Defendants Motion to Dismiss. Defendants Motion to Dismiss is denied 11. Plaintiffs Motion for Summary Judgment is granted in part and denied in part 7 as follows: 1) Plaintiffs motion is granted to the extent the court finds that the term "expert advice or assistance" is impermissibly vague; and 2) plaintiffs motion is denied with respect to the remaining arguments raised. Accordingly, defendants are enjoined from enforcing the USA Patriot Acts prohibition on providing "expert advice or assistance" to either the Kurdistan Workers Party, a.k.a. Partiya Karkeran Kurdistan, a.k.a. PKK, a.k.a. the Kurdistan Freedom and Democracy Congress, a.k.a.

DATE	DOCKET NUMBER	PROCEEDINGS
		KADEK, a.k.a. Freedom and Democracy Congress of Kurdistan, a.k.a. the Peoples Defense Force, a.k.a. Halu Mesru Savunma Kuvveti (HSK); or the Liberation Tigers of Tamil Eelam, a.k.a. LTTE, a.k.a. Tamil Tigers, a.k.a., Ellalan Force against any of the named plaintiffs or their members. The court declines to grant a nationwide injunction. (mg,) (Entered: 03/18/2004)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/12/04	37	NOTICE OF APPEAL/ REPRESENTATION STATEMENT to 9th CCA filed by defendants John Ashcroft, Colin Powell, United States Department of Justice, United States Department of State. Appeal of Order on Motion, 30 Filed On: 03/17/04; Entered On: 03/18/04; Filing fee $255., Waived. cc: John R. Tyler, Department of Justice, Civil Division; Carol

DATE	DOCKET NUMBER	PROCEEDINGS
		Sobel; David Cole; Nancy Chang (wdc,) Modified on 7/23/2004 (wdc,). (Entered: 05/12/2004)
	* * * * *	
5/25/04	39	JUDGMENT by Judge Audrey B. Collins on plaintiffs Motion for Summary Judgment and Defendants Motion to Dismiss. It is Ordered and Adjudged that defendants motion under Rule 12(b)(1) to dismiss plaintiffs claims for lack of jurisdiction is DENIED. Plaintiffs motion for summary judgment and defendants Rule 12(b)(6) motion to dismiss are respectively GRANTED IN PART and DENIED in part as follows: 1) Plaintiffs motion is granted to the extent the Court found that the term "expert advice or assistance" is unconstitutionally vague; and defendants motion to dismiss this claim is DENIED; and 2) Plaintiffs

DATE	DOCKET NUMBER	PROCEEDINGS
		motion is DENIED with respect to the remaining claims and arguments made; and defendants motion to dismiss with respect to such claims and arguments is GRANTED. Accordingly, defendants are ENJOINED from enforcing the USA Patriot Acts prohibition on providing "expert advice or assistance" to either the Kurdistan Workers Party or the Liberation Tigers of Tamil Eelam against any of the named Plaintiffs or their members. The Court declined to grant a nationwide injunction. (Made JS-6. Case Terminated.) (mg,) (Entered: 05/26/2004)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/22/04	44	NOTICE OF APPEAL to 9th CCA filed by defendants John Ashcroft, Colin Powell, United States Department of Justice, United States Department of State. Appeal of

DATE	DOCKET NUMBER	PROCEEDINGS
		Judgment, 39 Filed On: 05/24/04; Entered On: 5/26/04; Filing fee $255., Waived. cc: John R. Tyler; Carol A. Sobel; David Cole; Nancy Chang; Paul L. Hoffman; Visuvanathan Rudrakumaran; Douglas N. Letter; Joshua Waldman. (weap,) (Entered: 07/22/2004)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/24/05	49	MANDATE of 9th CCA filed as to Appeal to Circuit Court, 37, Appeal to Circuit Court, 44, CCA # 04-55871, 04-56279. The judgment of said district court, appeal is vacated and remanded. Mandate received in this district on 5/27/05. (ghap,) (Entered: 06/02/05)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/25/05	52	ORDER RE: PLAINTIFFS MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS MOTION TO DISMISS AND MOTION FOR SUMMARY JUDG-

DATE	DOCKET NUMBER	PROCEEDINGS
		MENT by Judge Audrey B. Collins, The Court concludes that plaintiffs have standing to raise vagueness challenges to the terms "training," "expert advice or assistance," "personnel," and "service." Therefore, Defendants motion to dismiss forlack [*sic*] of standing is DENIED. The parties cross motions for summary judgment are GRANTED IN PART AND DENIED IN PART as follows: The Court finds that the lack of a specific intent requirement to further the terrorist activities of foreign terrorist organizations in the AEDPAs prohibition on providing material support or resources to foreign terrorist organizations does not violate due process under the Fifth Amendment. The Court GRNATS [*sic*] Defendants motion and DENIES Plaintiffs motion on this ground (see document for further

DATE	DOCKET NUMBER	PROCEEDINGS
		details) (bg,) (Entered: 07/29/2005)
	* * * * *	
9/16/05	54	JUDGMENT by Judge Audrey B. Collins, It is ORDERED that The parties cross-motions for Summary Judgment are GRANTED IN PART AND DENIED IN PART; Accordingly Defendants, their agents are ENJOINED from enforcing 18 USC 2339Bs probition [*sic*] on providing "training"; The Court declined to grant a nationwide injunction. (MD JS-6, Case Terminated). (bg,) (Entered: 09/19/2005)
	* * * * *	

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. 2:98-cv-01971-ABC-RC

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE & HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM, PLAINTIFFS

v.

ALBERTO GONZALES IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES SUBSTITUTED FOR JANET RENO, UNITED STATES DEPARTMENT OF JUSTICE, CONDOLEEZA RICE IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE UNITED STATES SUBSTITUTED FOR MADELEINE ALBRIGHT, UNITED STATES DEPARTMENT OF STATE, JOHN SNOW IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/19/98	1	COMPLAINT filed Summons(es) issued referred to Discovery Brian Q. Robbins (jp) (Entered: 03/20/1998)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
3/26/98	4	NOTICE OF MOTION AND MOTION by plaintiffs for preliminary injunction; motion hearing set for 9:30 5/11/98 (kh) (Entered: 03/30/1998)
	* * * * *	
5/20/98	14	MEMO IN OPPOSITION by dfts Janet Reno, USDJ, Madeleine Albright, US Dept of State to motion for preliminary injunction [4-1] (kh) (Entered: 05/21/1998)
	* * * * *	
6/8/98	17	ORDER by Judge Audrey B. Collins GRANT in part DENY in part Plf's motion for preliminary injunction [4-1] (ENT 6/10/98), (pj) (Entered: 06/10/1998)
	* * * * *	
6/15/98	18	FINDINGS OF FACT &CONCLUSIONS [*sic*] OF LAW &ORDER [*sic*] RE MOT FOR PRELIM INJ:

DATE	DOCKET NUMBER	PROCEEDINGS
		IT IS ORD that dfts Janet Reno, as Atty Gen of the US, USDOJ, Madeleine Albright, as US Secretary of State, &U.S. [*sic*] Dept of State, etc, are preliminarily enjoined from (see doc for for [*sic*] detail). The bond requriement [*sic*] sh be waived. by Judge Audrey B. Collins for preliminary injunction (ENT 6/16/98), mld copies &ntc [*sic*] (pj) (Entered: 06/16/1998)
6/23/98	21	NOTICE OF PRELIMINARY INJUNCTION APPEAL by plaintiffs to 9th C/A from Dist. Court Ord fld 6/15/98 &ent [*sic*] 6/16/98 (cc: Carol Sobel, Center For Constitutional Rights; David Cole; Nancy Chang; John Tyler; AUSA) Fee: Paid. (pjap) Modified on 06/23/1998 (Entered: 06/23/1998)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/15/98	24	AMENDED NOTICE OF APPEAL by plaintiff World Tamil to 9th C/A from Dist. Court ord dted [*sic*] 6/8/98 &6/16/98 [*sic*]. Plf seek clarify appeal in furthereance [*sic*] of 6/8/98 ord. [18-2], [20-2] (cc: Carol A.1 [*sic*] Sobel, Esq; John Tyler, Civil Div. U.S. Dept of Justice; AUSA, Manella) Fee: Waived (fvap) (Entered: 07/16/1998)
8/4/98	25	NOTICE OF APPEAL by defendant Janet Reno, defendant US Dept of State to 9th C/A from Dist. Court Ord ent 6/10/98 &Ord [*sic*] ent 6/16/98, [18-2], [17-1] (cc: Frank W. Hunger; David Cole; Nancy Chang; Carol sobel) Fee: Waived (weap) (Entered: 08/04/1998)

* * * * *

3/30/00	33	MANDATE from Circuit Court of Appeals The Crt orders that the mandate of the 9th CCA affirming is

DATE	DOCKET NUMBER	PROCEEDINGS
		hereby fld &spread [*sic*] upon the min of this US District Crt. (pj) (Entered: 04/05/2000)
		* * * * *
9/29/00	41	MANDATE from Circuit Court of Appeals # 98-56062/98-56280 the crt orders tha [*sic*] the mandate of the 9th CCA Affirming. id [*sic*] is hereby fild and spread upon the mins of this USDC> ((yc) (Entered: 10/06/2000)
		* * * * *
3/15/01	45	NOTICE of denial of petition for certiorari by plaintiffs' (bp) (Entered: 03/16/2001)
		* * * * *
7/31/01	53	NOTICE OF MOTION AND MOTION by plaintiff World Tamil Coordinating Comm for summary judgment No hearing date/time

DATE	DOCKET NUMBER	PROCEEDINGS
		set (bg) (Entered: 08/03/2001)
		* * * * *
8/1/01	57	MOTION by defendants US Dept of State, Madeleine Albright to dismiss in part, &for [*sic*] partial summary judgment (rrey) (Entered: 08/06/2001)
		* * * * *
8/14/01	60	MOTION by defendants Janet Reno, Madeleine Albright to dismiss in part, &for [*sic*] partial summary judgment (rrey) (Entered: 08/16/2001)
		* * * * *
8/28/01	65	MEMO IN OPPOSITION by plaintiff to motion to dismiss in part [60-1], motion for partial summary judgment [60-2] (bg) (Entered: 08/29/2001)
8/29/01	66	OPPOSITION by defendants to motion for summary

DATE	DOCKET NUMBER	PROCEEDINGS
		judgment [53-1] (rrey) (Entered: 08/31/2001)
	* * * * *	
10/2/01	69	ORDER by Judge Audrey B. Collins GRANT in part DENY in part motion to dismiss in part [60-1], GRANT in part DENY in part motion for partial summary judgment [60-2], GRANT in part DENY in part motion to dismiss in part [57-1], GRANT in part DENY in part motion for partial summary judgment [57-2], GRANT in part DENY in part motion for summary judgment [53-1] Accordingly dts, their officers, agents, etc are permanently enjoined from enforcing the AEDPA's prohibition on providing training &personnel [*sic*] to foreign terrorist organizations (ENT 10/3/01) ntc sent (bg) (Entered: 10/03/2001)
10/2/01	70	FINAL JUDGMENT AND ORDER: by Judge Audrey

DATE	DOCKET NUMBER	PROCEEDINGS
		B. Collins. It is ORD that except as noted below final jgm be entered in favor of dfts that sections 302 &303 [*sic*] Fo [*sic*] the anti-terrorism &effective [*sic*] death penalty act fo [*sic*] 1996 are constitutional. It is ord that final jgm be entered in favor of plas that the terms personal & training contained in section 303 are unconstitutional ont he [*sic*] grounds that they are impermissibly vague. As such the crt issues a permanent injunction enjoining prosecution of the named plas &their [*sic*] members for violating the prohibition on providing personnel &training [*sic*] to foreing [*sic*] terrorist organizations. The crt will retain jurisdiction terminating case (MD JS-6) (ENT 10/4/01) ntc sent (bg) (Entered: 10/04/2001)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/23/01	72	NOTICE OF MOTION AND MOTION by defendants for an amendment of final jgm ; motion hearing set for 10:00 11/19/01 (rrey) (Entered: 10/24/2001)

* * * * *

11/6/01	76	ORDER AMENDING FINAL JUDGMENT by Judge Audrey B. Collins granting motion for an amendment of final jgm [72-1] At final jgm page 2, lines 2-3, replace the phrase "to foreign terrorist organizations" with "to either the Kurdistan Workers' Party, aka Partiya Karkeran Kurdistan, aka PKK or the Liberation Tigers of Tamil Eelam aka Ltte aka Tamil Tigers, aka Ellalan Force." (ENT 11/07/01) ntc sent (bg) (Entered: 11/7/2001)
12/28/01	78	NOTICE OF APPEAL by defendant John Ashcroft, defendant Colin Powell, defendant US Dept of State, defendant United States De-

DATE	DOCKET NUMBER	PROCEEDINGS
		partment of Justice to 9th C/A from Dist. Court Final Jgm &ord [*sic*] fld 10/2/01 &ent [*sic*] 10/4/01, Ord Amd Final Jgm fld 11/6/01 &ent 11/7/01 [*sic*] [70-2], [76-1] (cc: John R. Tyler; David Cole; Nancy Chang; Carol A. Sobel) Fee: Waived (weap) (Entered: 01/03/2002)
1/2/02	77	NOTICE OF APPEAL by plaintiff Nagalingam Jeyalingam, plaintiff World Tamil, planitff Federation of Tamil, plaintiff Tamil Welfare, plaintiff Tamils Northern CA, plaintiff Ilankai Thamil Sangam, plaintiff Ralph Fertig, plaintiff Humanitarian Law to 9th C/A from Dist. Court ord fld 10/02/01, ent 10/03/01 [69-1], ord fld 11/06/01, ent 11/07/01 [76-1]. (cc: David Cole; Nancy Chang, Center For Constitutional Rights; Paul L. Hoffman, Schonbrun, De Simone, Seplow, Harris &Hoffman,

DATE	DOCKET NUMBER	PROCEEDINGS
		[*sic*] LLP; Carol A. Sobel; Visuvanathan Rudrakumaran; John Ashcroft, John Tyler, Dept of Justice, John S. Gordon, AUSA) Fee: Paid. (cbr) (Entered: 01/02/2002)
	* * * * *	
2/14/05	97	MANDATE of 9th CCA filed as to Appeal to Circuit Court, 78 Appeal to Circuit Court, 77 CCA # 02-55082, 02-55083. The judgment of said district court affirmed in part, vacated and remanded. Mandate received in this district on 2/16/05. (ghap,) (Entered: 02/23/2005)
	* * * * *	
5/13/05	107	Brief of Amici Curiae filed by Amici Curiae American Civil Liberties Union, Global Exchange, Jerusalem Fund for Education &Community [*sic*] Development, Middle East Children's Alliance,

DATE	DOCKET NUMBER	PROCEEDINGS
		and Operation USA. (gk,) (Entered: 05/17/2005)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/05	111	NOTICE OF MOTION AND MOTION for Renewed Summary Judgment filed by Plaintiff World Tamil Coordinating Committee. (yl,) (Entered: 05/20/2005)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/8/05	119	MOTION to Dismiss, in Part, and for Summary Judgment filed by Defendants the United States Attorney General, the Secretary of the United States Department of State, the United States Department of Justice, and the United States Department of State. Motion set for hearing on 7/25/2005 at 10:00 AM before Honorable Audrey B. Collins. Lodged Statement of Uncontroverted Facts. (gk,) (Entered: 07/13/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
7/18/05	122	MEMORANDUM in Opposition to Defendants' Motion to Dismiss or for Summary Judgment 119, and Reply in Support of Plaintiffs' Motion for Summary Judgment 111 filed by Plaintiff World Tamil Coordinating Committee. (gk,) (Entered: 07/25/2005)
	* * * * *	
7/25/05	127	(DUPLICATE) ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JDUGMENT [*sic*] AND DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT by Judge Audrey B. Collins: The Court concludes that Plaintiffs have standing to raise vagueness challenges to the terms "training," "expert advice or assistance," "personnel," and "service." Therefore, Defen-

DATE	DOCKET NUMBER	PROCEEDINGS
		dants' Motion to Dismiss for lack of standing 119 is denied. The parties' cross-motions for summary judgment 111, 119 are granted in part and denied in part. See document for specific details. (gk,) (Entered: 07/27/2005)

* * * * *

8/19/05	134	SUPPLEMENTAL COMPLAINT re 1 filed by Plaintiffs Humanitarian Law Project, Ralph Fertig, Ilankai Thamil Sangam, Tamils of Northern California, Tamil Welfare &Human [*sic*] Rights Committee, Federation of Tamil Sangams of North America, World Tamil Coordinating Committee, Nagalingam Jeyalingam against Defendants Alberto Gonzales, United States Department of Justice, Condoleeza Rice, United States Department of State, John Snow and United States Department of the Treasury.

DATE	DOCKET NUMBER	PROCEEDINGS
		(gk,) Modified on 8/24/2005 (gk,). (Entered: 08/24/2005)
	* * * * *	
9/16/05	140	JUDGMENT ON PALINTIFFS' [*sic*] MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS IN PART AND CROSS-MOTION FOR SUMMARY JUDGMENT by Judge Audrey B. Collins: It is ordered and adjudged that: The Parties Cross-Motions for Summary Judgment are granted in part and denied in part as follows: (1) Plaintiffs' summary judgment motion 111 and Defendants' cross-motion for summary judgment 119 is denied to the extent that the Court finds that the terms "training"; "expert advice or assistance" in the form of "specialized knowledge"; and "service" are impermissibly vague under the Fifth Amendment. (2) Plain-

DATE	DOCKET NUMBER	PROCEEDINGS
		tiffs' summary judgment motion is denied with respect to their remaining claims and Defendants' cross-motion for summary judgment with respect to such claims and arguments is granted. Accordingly, Defendants are enjoined from enforcing 18 U.S.C. Section 2339B's prohibition on providing "training"; "expert advice or assistanced [*sic*]" in the form of "specialized knowledge"; or "service" to either the Kurdistan Workers' Party, a.k.a. Partiya Karkeran Kurdistan, a.k.a. PKK, a.k.a. the Kurdistan Freedom and Democracy Congress, a.k.a. KADEK, a.k.a. Freedom and Democracy Congress of Kurdistan, a.k.a. the People's Defense Force, a.k.a. Halu Mesru Savunma Kuvveti (HSK); or the Libaration [*sic*] Tigers of Tamil Eelam, a.k.a. LTTE, a.k.a. Tamil Tigers, a.k.a. Ellalan Force

DATE	DOCKET NUMBER	PROCEEDINGS
		against any of the named Plaintiffs or their members. The Court declines to grant a nationwide injunction. (MD JS-6, Case Terminated). (gk,) (Entered: 09/16/2005)
	* * * * *	
11/10/05	143	NOTICE OF APPEAL to 9th CCA filed by defendants Alberto Gonzales, US Department of Justice, Condoleeza Rice. Appeal of Judgment 140 Filed On: 09/16/05; Entered On: 09/16/05. Filing fee $ 255. Waived. cc: John R. Tyler, Department of Justice; Carol Sobel; David Cole; Shayana Kadidal; Paul L. Hoffman; Visuvanathan Rudrakumaran. (Consolidated with CV 03-06107 ABC(RCx). (cbr,) (Entered: 11/16/2005)
	* * * * *	
11/22/05	145	NOTICE OF APPEAL to 9th CCA filed by plaintiffs

DATE	DOCKET NUMBER	PROCEEDINGS
		Humanitarian Law Project, Ralph Fertig, Ilankai Thamil Sangam, Tamils of Northern California, Tamil Welfare & Human Rights Committee, Federation of Tamil Sangams of North America, World Tamil Coordinating Committee, Nagalingam Jeyalingam. Appeal of Judgment, 140 Filed On: 9/16/05; Entered On: 9/16/05; Filing fee $255, Paid receipt number 80308. cc: Carol Sobel; Alberto Gonzales and Douglas N. Letter, Department of Justice, Washington, D.C.; John Tyler, Department of Justice, Washington, D.C.; Debra Yang, United States Attorney. (ghap,) (Entered: 11/23/2005)
	* * * * *	
1/13/09	159	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 145, Notice of Appeal to 9th Circuit Court of Appeals, 143, CCA # 05-56753,

DATE	DOCKET NUMBER	PROCEEDINGS
		05-56846. The Judgment of the District Court is AFFIRMED. Mandate received in this district on 1/13/09. (lr) (Entered: 01/20/2009)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. 2:03-cv-06107-ABC-Mc

HUMANITARIAN LAW PROJECT, RALPH FERTIG, ILANKAI THAMIL SANGRAM, DR. NAGALINGAM JEYALINGAM, WORLD TAMIL COORDINATING COMMITTEE, FEDERATION OF TAMIL SANGRAMS OF NORTH AMERICA, TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE, PLAINTIFFS

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; COLIN POWELL, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE; DEFENDANTS

[Filed: Aug. 27, 2003]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action challenges the constitutionality of §§ 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") as they were modified by the United

and Strengthening America by the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001), on the grounds that they criminalize the provision of "expert advice and assistance" to the lawful and non-violent activities of organizations that the Secretary of State ("Secretary") designates as foreign terrorist organizations ("designated organizations"). The AEDPA effectively grants the Secretary blanket, unreviewable authority to designate any foreign organization that engages in any unlawful use or threat of force against person or property a "terrorist organization." The USA PATRIOT Act, in Title VIII, § 805(a)(2)(B), then makes it a crime, punishable by up to 15 years imprisonment or a substantial fine, or both, to provide "expert advice and assistance" to a designated organization. This appears to make it a criminal offense for a United States citizen to engage in any activity that helps a designated organization in any way that might be considered "expert," even if the expertise provided is in the form of international law training, human rights advocacy, the provision of medical advice on improving health care in regions controlled by the organization, political organizing, or publication of literature. The plaintiffs in this action consist of five organizations and two United States citizens who wish to provide material support to the lawful humanitarian and political activities of two designated organizations, the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Plaintiffs maintain that the First and Fifth Amendments to the United States Constitution protect their rights to provide such advice and assistance and render § 805(a)(2)(B) of the USA PATRIOT Act unconstitutional as applied to such support. However, because the Secretary has designated the PKK and the LTTE as foreign terrorist organizations, plaintiffs are afraid to provide such advice and assistance out of fear of criminal investigation, prosecution and conviction. Plaintiffs seek declaratory and injunctive relief declaring the USA PATRIOT Act to be unconstitutional to the extent that it criminalizes the provision of "expert advice and assistance" and enjoining the government from criminally prosecuting individuals and organizations for providing expert advice and assistance to designated organizations.

JURISDICTION AND VENUE

2. This action arises under the United States Constitution, the AEDPA and the USA PATRIOT Act. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

3. The Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, and Rule 57 of the Federal Rules of Civil Procedure ("F.R.C.P."). The Court may grant injunctive relief pursuant to F.R.C.P. Rule 65.

4. Venue lies in the Central District of California, the federal judicial district in which plaintiff International Educational Development, Inc./Humanitarian Law Project is headquartered and plaintiff Ralph Fertig resides.

PARTIES

Plaintiffs

5. Plaintiff HUMANITARIAN LAW PROJECT ("HLP") is a not-for-profit organization headquartered

at 8124 West Third Street, Los Angeles, California 90048. In 1989, the International Educational Development, Inc., a non-sectarian not-for-profit organization founded in the 1950s by Jesuit brothers to provide assistance to schools, hospitals, and impoverished third world communities, absorbed the Humanitarian Law Project into its operation. The HLP, which is also referred to as the International Educational Development, Inc./Humanitarian Law Project, advocates for the peaceful resolution of armed conflicts and for worldwide compliance with humanitarian law and human rights law. It has consultative status to the United Nations ("U.N.") and regularly participates in meetings of the U.N. Commission on Human Rights in Geneva, Switzerland. It sues on its own behalf.

6. Plaintiff RALPH D. FERTIG is the President of the HLP and appears as a plaintiff in this action in his individual capacity. Judge Fertig is an Assistant Professor at the University of Southern California's Graduate School of Social Work [*sic*] was a federal Administrative Judge for the U.S. Equal Employment Opportunity Commission until his recent retirement. Before that, Judge Fertig was a civil rights attorney, social worker, and sociologist. He has devoted more than half a century to human rights work in the United States and abroad. He has served continuously as a member of the HLP's Board of Directors since 1989, and has been the President of the HLP from 1993 to 1995 and from 1997 to the present. He has participated in HLP delegations that have investigated human rights violations in Turkey, Mexico, and El Salvador. He is a United States citizen and resides in Los Angeles, California.

7. Plaintiff ILANKAI THAMIL SANGAM ("Sangam") is a not-for-profit corporation founded in 1977, incorporated in New Jersey, and headquartered in Maryknoll, New York. The Sangam has approximately 135 members who reside in the New York City metropolitan area, most of whom are Tamils who were born in Sri Lanka. Its membership includes citizens and non-citizens, many of whom are professionals in the fields of medicine, law, accounting and business. The Sangam's objectives are to promote the association of Tamils in the New York City area, to promote knowledge of the Tamil language, culture, and heritage, and to provide humanitarian assistance to Tamils in Sri Lanka, especially those who are refugees and orphans as a result of the political strife in Sri Lanka. It sues on its own behalf and on behalf of its members.

8. Plaintiff DR. NAGALINGAM JEYALINGAM is a naturalized United States citizen who is a Tamil from Sri Lanka[.] Dr. Jeyalingam was the President of the Ilankai Thamil Sangam from 1995 to 1997, and is. [*sic*] currently an active member of that organization. He graduated from University of Colombo, Sri Lanka and came to the United States in 1970 to undergo specialized medical training in the field of otolaryngology. He is a New York State-licensed physician, a Fellow of the American Academy of Otolaryngology and Head and Neck Surgery, and a member of the New York State Medical Society and the Medical Society of Orange County of New York. He has been practicing as a surgeon in New York for more than 25 years. He resides in Newburgh, New York. He sues solely in his individual capacity.

9. Plaintiff WORLD TAMIL COORDINATING COMMITTEE ("WTCC") is an organization headquartered in Jamaica, New York. Its objectives are to advocate in the United States in favor of Tamil self-determination in Sri Lanka and for an end to systemic human rights violations against Tamils living in Sri Lanka. It sues on its own behalf.

10. Plaintiff FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA ("FETNA") is a non-profit corporation headquartered in Chicago, Illinois, which was founded in 1986. It is an umbrella organization whose membership includes approximately 30 Sangams in the United States, including plaintiff Ilankai Thamil Sangam. The term "Sangam" in the Tamil language refers to an association. The FETNA's purposes are to encourage the appreciation of Tamil language, literature, arts, cultural heritage and history, and to encourage friendship among the Tamils and the Tamil Sangams throughout North America and the world. Each of its member Sangams shares these purposes. The FETNA member Sangams are comprised of United States citizens and non-citizens who are ethnic Tamils from all over the world, including India and Sri Lanka. The FETNA sues on behalf of its member Sangams, and their individual members, who seek to support the lawful and non-violent activities of the LTTE.

11. Plaintiff TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE ("TWHRC") is a Maryland association headquartered in Bethesda, Maryland. Founded in 1987, it consists of approximately 100 Tamils. Its members, both United States citizens and non-citizens, are Tamils born in Sri Lanka, and many of its members have family and friends who currently live in

Sri Lanka. The TWHRC's primary objectives are to protect the human rights of the Tamils in Sri Lanka and to promote their health, social well-being, and welfare. It sues on its own behalf and on behalf of its members, who seek to support the lawful and non-violent activities of the LTTE.

Defendants

12. Defendant JOHN ASHCROFT is sued only in his official capacity as the Attorney General of the United States. He is responsible for prosecuting violations of the AEDPA and the USA PATRIOT Act.

13. Defendant UNITED STATES DEPARTMENT OF JUSTICE is responsible for prosecuting criminal violations of the federal laws, including the AEDPA and the USA PATRIOT Act.

14. Defendant COLIN POWELL is sued only in his official capacity as the United States Secretary of State. The Secretary is responsible for designating "foreign terrorist organizations" under the AEDPA. 8 U.S.C. §1189.

15. Defendant UNITED STATES DEPARTMENT OF STATE is responsible for designating "foreign terrorist organizations" under the AEDPA, 8 U.S.C. §1189.

STATUTORY AND REGULATORY FRAMEWORK

16. On April 24, 1996, the AEDPA went into effect. Title III of the AEDPA, entitled "International Terrorism Prohibitions," criminalizes, *inter alia*, the provision of material support or resources to designated organizations.

17. Section 303(a) of the AEDPA, 18 U.S.C. § 2339B, is entitled "Providing Material Support or Resources to Designated Foreign Terrorist Organizations." Pursuant to 18 U.S.C. § 2399B(a), it is a criminal offense, punishable by up to 10 years imprisonment or a substantial fine, or both, to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so[.]"

18. The AEDPA defines "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A; 18 U.S.C. § 2339(B)(a) [*sic*] and (g)(4).

19. Section 303(a) of the AEDPA provides that "[t]he Attorney General shall conduct any investigation of a possible violation of [18 U.S.C. § 2339B] . . . ." 18 U.S.C. § 2339B(e).

20. Section 303(a) of the AEDPA authorizes the Attorney General to initiate a civil action in a district court to seek an injunction "[w]henever it appears to the Secretary [of the Treasury] or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of [18 U.S.C. § 2339B]." 18 U.S.C. § 2339B(c).

21. Section 302 of the AEDPA, entitled "Designation of Foreign Terrorist Organizations," establishes the procedures which the Secretary must follow in designating organizations as foreign terrorist organizations. 8 U.S.C. § 1189. It authorizes the secretary to designate any foreign organization that "engages in terrorist ac-

tivity (as defined in [8 U.S.C. §1182(a)(3)(B)])," and whose terrorist activity "threatens the security of United States nationals or the national security of the United States." "Terrorist activity" is defined to include, *inter alia*, any unlawful use of, or threat to use, an explosive or firearm against person or property, unless for mere personal monetary gain. 8 U.S.C. §1182(a)(3)(B)(ii)(V)-(VI). "National security" is, in turn, defined to mean "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. §1189(c)(2). Thus, the AEDPA gives the Secretary discretion to designate any foreign organization that uses or threatens force and whose actions the Secretary deems contrary to our foreign relations.

22. The Secretary's designation is for all practical purposes unreviewable. The AEDPA allows a designated organization to challenge its designation within 30 days by filing a suit in the Court of Appeals for the District of Columbia. However, the designation can be supported by classified information presented *ex parte* and *in camera* to the Court and not disclosed to the organization; the appeal is decided on the administrative record, and thus affords no opportunity for the organization to submit evidence; and the Secretary's determination that a group's activities threaten the "foreign relations" or "national security" of the United States is nonjusticiable, as a court cannot second-guess the Secretary of State on what threatens foreign relations or national security.

23. Once an organization is designated as a foreign terrorist organization, it becomes a crime under 18 U.S.C. § 2339B for anyone to knowingly provide it material support or resources.

24. On October 8, 1997, Madeline Albright, the previous Secretary of State, designated 30 organizations, including the PKK and the LTTE, as foreign terrorist organizations under the AEDPA. 62 Fed. Reg. 52,649-52,651 (October 8, 1997). The PKK and the LTTE continue to be designated as foreign terrorist organizations under the AEDPA.

25. On November 6, 1997, the LTTE sought judicial review of the Secretary's decision to designate it as a foreign terrorist organization in the United States Court of Appeals for the District of Columbia, pursuant to 8 U.S.C. §1189. The LTTE maintained, *inter alia*, that it is a national liberation movement seeking to realize the right of the Tamil people to self-determination pursuant to a mandate of the Tamil people and that it is not a terrorist organization under either the laws of the United States or international law. The Court of Appeals, however, refused to remove the designation.

26. The PKK considered challenging its designation, but upon consultation with attorneys in the United States, determined that the judicial review process was illusory, particularly in light of the non-justiciable nature of the Secretary's determinations of "foreign policy" and "national security," and therefore decided not to file suit. It objects, however, to its designation as a "foreign terrorist organization."

27. In a related suit filed in March 1998 by the plaintiffs in this suit challenging the AEDPA material support provision, Judge Audrey Collins granted a preliminary injunction that, in relevant part, prohibited prosecution under the terms "training" and "personnel" in the definition of "material support or resources" on the grounds that they are unconstitutionally vague. *Hu-*

manitarian Law Project v. Reno, 9 F. Supp. 1176 (C.D. Cal. 1998). In March 2000, The [*sic*] Ninth Circuit upheld the preliminary injunction and recognized that the vague definition of prohibited activity threatened to chill the plaintiffs' constitutionally protected activities. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

28. On October 2, 2001, Judge Collins issued a permanent injunction that, in relevant part, enjoined defendants from prosecuting plaintiffs based on the portion of AEDPA prohibiting the provision of "material support or resources" in the form of "training" or "personnel" to designated "foreign terrorist organizations" on the grounds that the terms are unconstitutionally vague. *Humanitarian Law Project v. Reno*, No. CV 98-1971 ABC (BQRx), 2001 U.S. Dist. LEXIS, 16729 (C.D. Cal. 2001). The permanent injunction was appealed to the Ninth Circuit and argument has been heard, but no decision has been issued.

29. On October 26, 2001, Congress enacted the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), P.L. 107-56. Section 805(a)(2)(B) of the USA PATRIOT Act amended 18 U.S.C. §2339A. Specifically, it broadened the definition of "material support or resources" to add as a proscribed act the provision of "expert advice or assistance." Section 810(d) of the USA PATRIOT Act amended 18 U.S.C. §2339B(a)(1) to provide for imprisonment from 15 years to life for violations. The term "expert advice or assistance" is so open-ended, vague, and overbroad that it would appear to criminalize a wide range of constitutionally protected conduct, including

representing an organization in a challenge to its designation, or teaching an organization how to petition and advocate for human rights. This suit challenges the Patriot Act amendment to the material support provision.

THE PKK AND THE LTTE

30. The PKK (a.k.a. "KADEK") is a political organization that was formed approximately 25 years ago by the Kurds in Southeastern Turkey with the goal of achieving political autonomy or self-determination. For more than 75 years, the Turkish government has subjected the Kurds to gross human rights abuses and discriminatory treatment. The Turkish government refuses to recognize the Kurds as a distinct and separate people with their own language, history, culture, identity and aspirations. Under Turkish law, one may be convicted of the crime of "separatism" for speaking publicly or publishing in Kurdish, or for expressing sympathy for the concept of Kurdish autonomy and self-determination. The PKK is the principal political organization representing the interests of the Kurds in Turkey and has mass support among the Kurds. The PKK has a political wing, known as the National Liberation Front of Kurdistan ("ERNK"), which engages in political organizing and advocacy both inside and outside Turkey, and provides social services and humanitarian aid to Kurdish refugees from Turkish abuses. The PKK also has a military wing, the Kurdish National Liberation Army ("ARGK"), which has engaged in military combat with Turkish armed forces, but has bound itself to the Geneva Convention and Protocols and has renounced terrorism.

31. The LTTE is a political organization that was formed in 1976 by Tamils in the Northern and Eastern Provinces of Sri Lanka, an area known as Tamil Eelam. Sri Lanka is populated by two major groups—the Tamils, who constitute a numerical minority of the population, and the Sinhalese, who constitute a numerical majority. For decades, the Tamils have been subjected to systematic human rights abuses and discrimination on the basis of ethnicity by the Sinhalese, who have controlled Sri Lanka since that nation gained its independence from Great Britain in 1948. The LTTE is the principal political organization advocating for the human rights of the Tamils, and for self-determination for the Tamils of Tamil Eelam. In furtherance of its goals, it engages in political organizing and advocacy, diplomatic activity, the provision of social services and humanitarian aid, the establishment of a quasi-governmental structure in Tamil Eelam, economic development, defense of the Tamil people from Sri Lankan human rights abuses, and military struggle against the government of Sri Lanka.

PLAINTIFFS' DESIRES TO SUPPORT THE PKK AND THE LTTE

Humanitarian Law Project ("HLP") and Ralph Fertig

32. Since 1991, the HLP and Judge Fertig have devoted a substantial amount of time and resources to advocating on behalf of the Kurds living in Turkey, and to working with and providing training, expert advice and other forms of support to the PKK in its efforts to protect the Kurds from human rights abuses. Both Judge Fertig and the HLP are opposed to the use of terrorism.

They have sought to assist the PKK and the Kurds in securing human rights only through non-violent means.

33. Judge Fertig and other HLP board members have traveled to Turkey, Kurdish exile communities in Europe, and other locations, to conduct fact-finding investigations, and have interviewed numerous individuals with first-hand knowledge of the relationship between the Turkish government and the Kurds, including members of the Turkish Parliament, journalists, human rights activists, lawyers, academicians, PKK members, and political prisoners.

34. The HLP and Judge Fertig have published many reports and articles presenting their findings and conclusions, which are generally supportive of the PKK and the struggle for Kurdish liberation. They have concluded that the Turkish government is guilty of committing extensive human rights violations against the Kurds, including the widespread use of arbitrary detentions and torture for persons who merely speak out for equal rights for Kurds or are suspected of sympathizing with those who do; the summary execution of more than 18,000 Kurds, and the destruction of some 2,400 Kurdish villages. In addition, they have concluded that the PKK is a party to an armed conflict governed by Geneva Conventions and Protocols and, therefore, is not a terrorist organization, as that term is understood in international law.

35. Since 1991, the HLP has sent a delegation to the U.N. Commission on Human Rights to advocate for the political interests of the Kurds living in Turkey. The HLP delegation has twice submitted reports to the U.N. that have documented human rights abuses by the Turkish government against the Kurds and have advo-

cated for the right of the PKK to be granted the protections of the Geneva Conventions and Protocols.

36. In the past, Judge Fertig and HLP members acting as individuals have petitioned members of the United States Congress to support human rights for the Kurds, to curtail United States military support to the Turkish armed forces, and to encourage negotiations between the PKK and the Turkish government. They have petitioned members of Congress to urge Turkey to release from prison Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, all of whom were elected to the Turkish Parliament in 1991 and are now serving 15-year sentences because the Turkish government has found that they are members or supporters of the PKK.

37. Judge Fertig, acting on behalf of the HLP, has participated in international peace conferences and other meetings where he has assisted members of the PKK and its political arm, the ERNK, in attempting to resolve peacefully the conflict between the Turkish government and the Kurds. In addition, Judge Fertig and other HLP representatives have provided training to some members of the PKK and other Kurds on how to present their human rights claims before the U.N. and other public-policy making bodies, including the United States Congress.

38. Since the PKK was designated as a foreign terrorist organization, the HLP and Judge Fertig had been deterred from continuing to assist the PKK to improve conditions for the Kurds living in Turkey. They want to continue to provide the forms of support they had previously provided, and would like to provide additional support as well. Specifically, they would like to: (1) engage in political advocacy on behalf of the PKK and the

Kurds before the U.N. Commission on Human Rights and the United States Congress; (2) provide the PKK and the Kurds with training and written publications on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations; (3) write and distribute publications supportive of the PKK and the cause of Kurdish liberation; (4) advocate for the freedom of political prisoners in Turkey, including Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak; and (5) assist PKK members at peace conferences and other meetings designed to support a peaceful resolution of the Turkish conflict.

39. The HLP and Judge Fertig would like to provide support to the PKK and the Kurdish people. However, they are afraid that the conduct in which they have engaged and in which they wish to continue to engage in may come within the scope of "expert advice or assistance." These activities include advising Kurds and Kurdish groups on recent developments in international human rights law, the procedures for seeking review by the newly established International Criminal Court, peacemaking negotiation skills, and advocacy of the rights of Kurds before the Human Rights Subcommission of the United Nations and legislative bodies throughout the world, including the United States Congress. Since the enactment of the USA PATRIOT Act and the amendment of the term "material support" to include "expert advice or assistance," the HLP and Judge Fertig have refrained from providing this advice and assistance for fear that they would be subjected to criminal prosecution.

Ilankai Thamil Sangam ("Sangam")

40. The Sangam and its members, many of whom are physicians, are deeply committed to improving medical care for the Tamils in Sri Lanka. The Sangam and its members wish to offer their expert medical advice and assistance to the LTTE by consulting with the LTTE on how the health care system in Tamil Eelam can be improved and by volunteering their advice and assistance to hospitals and medical centers in LTTE-controlled areas, some of which are run by the LTTE. The Sangam and its members do not seek to support any military or unlawful activities of the LTTE. The fear of criminal investigation, prosecution, and conviction deters the Sangam and its members from providing this expert advice and assistance to the LTTE.

Dr. Nagalingam Jeyalingam

41. Dr. Jeyalingam is deeply concerned for the welfare of the Tamils in Sri Lanka who lack many of the basic necessities of life, including adequate shelter, food, clothing, and medical care. Members of Dr. Jeyalingam's immediate family, including his mother, brothers, and sisters, were displaced from their homes and forced to flee from Sri Lanka to India as refugees in 1983.

42. Dr. Jeyalangam [*sic*] traveled to the Tamil Eelam region in northeast Sri Lanka in April of 2002, several months after the LTTE and the Sri Lankan government entered into a cease fire. During his travels, Dr. Jeyalangam [*sic*] visited a hospital in the Vanni region of Tamil Eelam, which is run by the LTTE. He

observed first-hand the lack of trained physicians and he would like to return to the Tamil Eelam region in order to consult with and provide to the LTTE his expert advice on how to improve the delivery of health care, with a special focus on the area of otolaryngology, and to provide his services as a trained otolaryngology specialist for a period of six months or longer. He is afraid to do so because he is fearful that he would be subjected to criminal prosecution for providing "expert advice and assistance" to the LTTE. Dr. Jeyalingam seeks to support only the lawful objectives of the LTTE.

World Tamil Coordinating Committee ("WTCC")

43. The WTCC and its members wish to provide expert advice and assistance to the LTTE toward the goals of achieving normalcy in war-torn Tamil Eelam and negotiating a permanent peace agreement between the LTTE and the government of Sri Lanka. Specifically, the WTCC and its members have expertise in the fields of politics, law, and economic development, and they wish to provide the LTTE with expert advice and assistance in these fields. Their expert advice and assistance is urgently needed to preserve the fragile peace that was put into place with the December 2001 ceasefire between the LTTE and the government of Sri Lanka and strengthened with the commencement of peace talks in September 2002. However, the WTCC and its members are afraid to provide their expert advice and assistance out of fear that they would be prosecuted under the Patriot Act for providing material support. The WTCC does not intend any of its activities to further illegal or violent ends.

Federation of Tamil Sangams of North America ("FETNA")

44. Many members of FETNA wish to provide their expert advice and assistance to the Tamils in the Tamil Eelam region, which is under the control of the LTTE. The cultural life and arts of Tamil Eelam suffered a severe setback during the years of civil war and are ripe for revival now that war has ended. Specifically, the FETNA's members have expertise in the fields of Tamil language, literature, arts, cultural heritage, and history, and they wish to provide their expert advice and assistance in these fields to Tamils in Tamil Eelam by developing school curricula in these subjects, teaching these subjects in the schools, and rebuilding Tamil Eelam's libraries and arts programs. However, in order for FETNA and its members to do this, they would be required to work in coordination with the LTTE, which controls the infrastructure in Tamil Eelam, and the FETNA and its members are fearful that doing so would lead to their prosecution under the Patriot Act for providing material support in the form of expert advice and assistance to the LTTE. The FETNA's members seek to support only the lawful humanitarian projects of the LTTE, and not its military activities.

Tamil Welfare and Human Rights Committee ("TWHRC")

45. The TWHRC and its members wish to provide expert advice and assistance to the LTTE so that Tamil Eelam can recover from the ravages of war and rebuild its devastated infrastructure. Specifically, the TWHRC and its members have expertise in the fields of economic development and information technology, and they wish

to provide the LTTE with expert advice and assistance in these fields towards the goal of promoting civil peace and stability in the lives of the Tamils of Tamil Eelam. However, the TWHRC and its members are afraid to do so out of fear that they would be prosecuted under the Patriot Act for providing material support in the form of expert advice and assistance. The TWHRC seeks only to support the LTTE's humanitarian efforts and does not seek to support the LTTE's military activities.

IRREPARABLE INJURY

46. All of the plaintiffs are suffering ongoing irreparable injury to their First Amendment rights, because the AEDPA, the USA PATRIOT Act, and the Secretary's designation of the LTTE and the PKK have deterred them from engaging in associational and speech activity that is protected by the First Amendment. This injury is exacerbated by the USA PATRIOT Act's vague and open-ended definition of "expert advice and assistance" and by the Secretary's selection of certain disfavored groups for designation.

47. Plaintiffs have no adequate remedy at law.

FIRST CAUSE OF ACTION

48. The allegations contained in the above paragraphs are repeated and realleged as though fully set forth herein.

49. Section 805(a)(2)(B) of the USA PATRIOT Act violates the First Amendment to the Constitution's guarantees of freedom of speech and association and to petition the government for a redress of grievances insofar as it makes it a criminal offense to provide "expert

advice and assistance" to a designated organization absent specific intent to further the organization's unlawful ends.

SECOND CAUSE OF ACTION

50. The allegations contained in the above paragraphs are repeated and realleged as though fully set forth herein.

51. Sections 302 and 303 of the AEDPA and §805(a)(2)(B) of the USA PATRIOT Act violate the First and Fifth Amendments to the Constitution by granting the Secretary of State effectively unreviewable authority to designate foreign organizations as "terrorist" and prohibit the provision of "expert advice and assistance," thereby inviting viewpoint discriminatory targeting of particular groups and their supporters based on their political views.

THIRD CAUSE OF ACTION

52. The allegations contained in the above paragraphs above, [*sic*] are repeated and realleged as though fully set forth herein.

53. Section 805(a)(2)(B) of the USA PATRIOT Act violates the First and Fifth Amendments to the Constitution because its prohibition of "expert advice or assistance" is impermissibly vague and substantially overbroad, failing to afford adequate notice to individuals of what is prohibited, giving government officials unfettered discretion in enforcement, and causing individuals to avoid First Amendment protected activity in order to steer clear of the prohibited conduct.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs seek an order and judgment:

1. Preliminarily and permanently enjoining defendants from criminally prosecuting plaintiffs under 18 U.S.C. § 2339B, as amended by the USA PATRIOT Act, for providing material support or resources in the form of "expert advice or assistance" to a designated foreign terrorist organization absent a specific intent to further the organization's unlawful terrorist activities;

2. Declaring the prohibition on the provision of "expert advice and assistance" added by § 805(a)(2)(B) of the USA PATRIOT Act unconstitutional as applied to plaintiffs' conduct because it violates the First Amendment and Fifth Amendments [*sic*] to the United States Constitution by criminalizing the act of providing material support or resources in the form of expert advice or assistance to designated foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities, and by doing so in an impermissibly vague and overbroad manner;

3. Awarding plaintiffs their costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412 *et seq.*; and

4. Granting such other and further relief as the Court may deem just and proper.

DATED: August 27, 2003

Respectfully submitted,
DAVID COLE
NANCY CHANG
CENTER FOR CONSTITUTIONAL RIGHTS
LAW OFFICE OF CAROL A. SOBEL
SCHONBRUN, DE SIMONE, SEPLOW, HARRIS & HOFFMAN
VISUVANATHAN RUDRAKUMARAN

By: /s/ CAROL A. SOBEL
CAROL A. SOBEL
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-1971 ABC (BQR)

HUMANITARIAN LAW PROJECT; RALPH FERTIG, ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; AND NAGALINGAM JEYALINGAM, PLAINTIFFS

v.

JANET RENO, AS ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; MANDELEINE ALBRIGHT, AS UNITED STATES SECRETARY OF STATE; AND UNITED STATES DEPARTMENT OF STATE, DEFENDANTS

[Filed: Mar. 19, 1998]

COMPLAINT

INTRODUCTION

1. This action challenges the constitutionality of §§ 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L No. 104-132, 110 Stat. 1214 (1996) ("Act"), on the grounds that they criminalize the provision of "material support or resources" to the law-

ful and non-violent activities of organizations that the Secretary of State ("Secretary") designates as foreign terrorist organizations ("designated organizations"). The Act effectively grants the Secretary blanket, unreviewable authority to designate any foreign organization that engages in any unlawful use or threat of force against person or property a "terrorist organization." It then makes it a crime, punishable by up to 10 years imprisonment or a substantial fine, or both, to provide "material support or resources," including books and educational materials to a school, food, clothing, and toys to an orphanage, and blankets to a refugee relief center, if these institutions are run by a designated organization. In addition, the material support proscribed by the Act is defined to include the provision of "personnel," which appears to make it a criminal offense for a United States citizen to donate his or her own time or services to any activity on behalf of a designated organization, including political organizing, engaging in peace negotiations, and publishing and distributing literature. The proscribed material support is also defined to include "training," which appears to make it a crime to teach organization members how to lobby and advocate for human rights. The plaintiffs in this action consist of six organizations and two United States citizens who wish to provide material support to the lawful humanitarian, and political activities of two designated organizations, the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Plaintiffs maintain that the First and Fifth Amendments to the United States Constitution protect their rights to provide such support and render §§ 302 and 303 of the Act unconstitutional as applied to such support. However, because the Secretary has designated the PKK and the

LTTE as foreign terrorist organizations, plaintiffs are afraid to provide such support out of fear of criminal investigation, prosecution, and conviction. Plaintiffs seek declaratory and injunctive relief declaring the Act to be unconstitutional to the extent that it criminalizes the provision of support not intended to further the unlawful activities of designated organizations and enjoining the government from criminally prosecuting individuals and organizations for providing support to designated organizations absent a specific intent to further the organization's unlawful terrorist activities.

JURISDICTION AND VENUE

2. This action arises under the United States Constitution and the Act. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

3. The Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, and Rule 57 of the Federal Rules of Civil Procedure ("F.R.C.P."). The Court may grant injunctive relief pursuant to F.R.C.P. Rule 65.

4. Venue lies in the Central District of California, the federal judicial district in which plaintiff Humanitarian Law Project is headquartered and plaintiff Ralph Fertig resides.

PARTIES

Plaintiffs

5. Plaintiff HUMANITARIAN LAW PROJECT ("HLP") is a not-for-profit organization headquartered at 8124 West Third Street, Los Angeles, California 90048. In 1989, the International Educational Develop-

ment, Inc., a non-sectarian not-for-profit organization founded in the 1950's by Jesuit brothers to provide assistance to schools, hospitals, and impoverished third world communities, absorbed the Humanitarian Law Project into its operation. The HLP, which is also referred to as the International Development, Inc./ Humanitarian Law Project, advocates for the peaceful resolution of armed conflicts and for world-wide compliance with humanitarian law and human rights law. It has consultative status to the United Nations ("U.N.") as a non-governmental organization and regularly participates in meetings of the U.N. Commission on Human Rights in Geneva, Switzerland. It sues on its own behalf.

6. Plaintiff RALPH D. FERTIG is the President of the HLP and appears as a plaintiff in this action in his individual capacity. Judge Fertig has been a federal administrative judge for the United States Equal Employment Opportunity Commission for the last three and a half years. Before that, Judge Fertig was a civil rights attorney, social worker, and sociologist. He has devoted more than half a century to human rights work in the United States and abroad. He has served continuously as a member of the HLP's Board of Directors since 1989, and has served as the President of the HLP from 1993 to 1995 and from 1997 to the present. He has participated in HLP delegations that have investigated human rights violations in Turkey, Mexico, and El Salvador. He is a United States citizen and resides in Los Angeles, California.

7. Plaintiff ILANKAI THAMIL SANGAM ("Sangam") is a not-for-profit corporation founded in 1977, incorporated in New Jersey, and headquartered in

Maryknoll, New York. The Sangam has approximately 135 members who reside in the New York City metropolitan area, most of whom are Tamils who were born in Sri Lanka. Its membership includes both citizens and non-citizens, many of whom are professionals in the fields of medicine, law, accounting, and business. The Sangam's objectives are to promote the association of Tamils in the New York City area, to promote knowledge of the Tamil language, culture, and heritage, and to provide humanitarian assistance to Tamils in Sri Lanka, especially those who are refugees and orphans as a result of the political strife in Sri Lanka. It sues on its own behalf and on behalf of its members,

8. Plaintiff DR. NAGALINGAM JEYALINGAM is a naturalized United States citizen who is a Tamil from Sri Lanka. Dr. Jeyalingam was the President of the Ilankai Thamil Sangam from 1995 to 1997, and is currently an active committee member of that organization. He graduated from University of Colombo, in Sri Lanka and came to the United States in 1970 to undergo specialized medical training in the field of otolaryngology. He is a New York State-licensed physician, a Fellow of the American Academy of Otolaryngology and Head and Neck Surgery, and a member of the New York State Medical Society and the Medical Society of Orange County of New York. He has been practicing as a surgeon in New York for the past 19 years and resides in Newburgh, New York. He sues solely in his individual capacity.

9. Plaintiff TAMILS OF NORTHERN CALIFORNIA ("TNC") is a not-for-profit organization that was founded in California in 1994. Approximately 120 individuals are currently members, most of whom are Tam-

ils who were born in Sri Lanka and are either United States citizens or non-citizens. Many members have family and friends still living in Sri Lanka. The TNC's membership includes many highly accomplished professionals in the fields of medicine, science and business. One of the TNC's primary objectives is to facilitate opportunities for Tamils living in the Northern California area to associate with one another and to share their knowledge of Tamil culture, politics, and history. Another of the TNC's primary objectives is to promote the provision of humanitarian assistance to impoverished Tamils of Sri Lanka. It sues on its own behalf and on behalf of its members.

10. Plaintiff WORLD TAMIL COORDINATING COMMITTEE ("WTTC") is an organization headquartered in Jamaica, New York. Its objectives are to advocate in the United States in favor of Tamil self-determination in Sri Lanka and for an end to systemic human rights violations against Tamils living in Sri Lanka. It sues on its own behalf.

11. Plaintiff FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA ("FETNA") is a non-profit corporation headquartered in Chicago, Illinois, which was founded in 1986. It is an umbrella organization whose membership includes 30 Sangams in the United States, including plaintiff Ilankai Thamil Sangam. The term "Sangam" in the Tamil language refers to an association. The FETNA's purposes are to encourage the appreciation of Tamil language, literature, arts, cultural heritage and history, and to encourage friendship among the Tamils and the Tamil Sangams throughout North America and the world. Each of its member Sangams shares these purposes.

The FETNA member Sangams are comprised of United States citizens and non-citizens who are Tamils from all over the world, including India and Sri Lanka. The FETNA sues on behalf of its member Sangams, and their individual members, who seek to support the lawful and non-violent activities of the LTTE.

12. Plaintiff TAMIL WELFARE AND HUMAN RIGHTS COMMIITEE ("TWHRC") is a Maryland association headquartered in Bethesda, Maryland. Founded in 1987, it consists of approximately 100 Tamils. Its members, both United States citizens and non-citizens, are Tamils born in Sri Lanka, and many of its members have family and friends who currently live in Sri Lanka. The TWHRC's primary objectives are to protect the human rights of the Tamils in Sri Lanka and to promote their health, social well-being, and welfare. It sues on its own behalf and on behalf of its members, who seek to support the lawful and non-violent activities of the LTTE.

Defendants

13. Defendant JANET RENO is sued solely in her official capacity as the Attorney General of the United States. She is responsible for prosecuting criminal violations of the federal laws, including the Act.

14. Defendant UNITED STATES DEPARTMENT OF JUSTICE is responsible for prosecuting criminal violations of the federal laws, including the Act.

15. Defendant MADELEINE ALBRIGHT is sued solely in her official capacity as the United States Secretary of State. The Secretary is responsible for designat-

ing "foreign terrorist organizations" under the Act. 8 U.S.C. § 1189.

16. Defendant UNITED STATES DEPARTMENT OF STATE is responsible for designating "foreign terrorist organizations" under the Act. 8 U.S.C. § 1189.

STATUTORY AND REGULATORY FRAMEWORK

17. On April 24, 1996, the Act went into effect. Title III of the Act, entitled "International Terrorism Prohibitions," criminalizes, *inter alia,* the provision of material support or resources to designated organizations.

18. Section 303(a) of the Act, 18 U.S.C. § 2339B, is entitled "Providing Material Support or Resources to Designated Foreign Terrorist Organizations." Pursuant to 18 U.S.C. § 2339B(a), it is a criminal offense, punishable by up to 10 years imprisonment or a substantial fine, or both, to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so[.]"

19. The Act defines "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A; 18 U.S.C. § 2339B(a) and (g)(4).

20. Section 303(a) of the Act provides that "[t]he Attorney General shall conduct any investigation of a possible violation of [18 U.S.C. § 2339B] . . . ." 18 U.S.C. § 2339B(e).

21. Section 303(a) of the Act authorizes the Attorney General to initiate a civil action in a district court to seek an injunction "[w]henever it appears to the Secretary [of the Treasury] or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of [18 U.S.C. § 2339B]." 18 U.S.C. § 2339B(c).

22. Section 302 of the Act, entitled "Designation of Foreign Terrorist Organizations," establishes the procedures which the Secretary must follow in designating organizations as foreign terrorist organizations. 8 U.S.C. § 1189. It authorizes the Secretary to designate any foreign organization that "engages in terrorist activity (as defined in [8 U.S.C. § 1182(a)(3)(B)]," and whose terrorist activity "threatens the security of United States nationals or the national security of the United States." "Terrorist activity" is defined to include, *inter alia,* any unlawful use of, or threat to use, an explosive or firearm person or property, unless for mere personal monetary gain. 8 U.S.C. § 1182(a)(3)(B)(ii)(V)-(VI). "National security" is, in turn, defined to mean "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(c)(2). Thus, the Act gives the Secretary the discretion to designate any foreign organization that uses or threatens force and whose actions the Secretary deems contrary to our foreign relations.

23. The Secretary's designation for all practical purposes unreviewable. The Act allows a designated organization to challenge its designation within 30 days by filing a suit in the Court of Appeals for the District of Columbia. However, the designation can be supported by classified information *ex parte* and *in camera* to the

Court and not disclosed to the organization; the appeal is decided on the administrative record, and thus affords no opportunity for the organization to submit evidence; and the Secretary's determination that a group's activities threaten the "foreign relations" or "national security" of the United States is non-justiciable, as a court cannot second-guess the Secretary of State on what threatens foreign relations or national security.

24. Once an organization is designated as a foreign terrorist organization, it becomes a crime under 18 U.S.C. § 2339B for anyone to knowingly provide it material support or resources.

25. On October 8, 1997, defendant Madeleine Albright designated 30 organizations, including the PKK and the LTTE, as foreign terrorist organizations under the Act. 62 Fed. Reg. 52,649-51 (October 8, 1997). These 30 organizations are the only organizations that have been designated to date as foreign terrorist organizations under the Act.

26. On November 6, 1997, the LTTE sought judicial review of the Secretary's decision to designate it as a foreign terrorist organization in the United States Court of Appeals for the District of Columbia, pursuant to 8 U.S.C. § 1189. The LTTE maintains, *inter alia*, that it is a national liberation movement seeking to realize the right of the Tamil people to self-determination pursuant to a mandate of the Tamil people and that it is not a terrorist organization under either the laws of the United States or international law. No decision has been rendered on the LTTE's request for judicial review.

27. The PKK considered challenging its designation, but upon consultation with attorneys in the United

States, determined that the judicial review process was illusory, particularly in light of the non-justiciable nature of the Secretary's determinations of "foreign relations" and "national security," and therefore decided not to file suit. It objects, however, to its designation as a "foreign terrorist organization."

THE PKK AND THE LTTE

28. The PKK is a political organization that was formed approximately 20 years ago by the Kurds in Southeastern Turkey with the goal of achieving Kurdish political autonomy or self-determination. For more than 70 years, the Turkish government has subjected the Kurds to gross human rights abuses and discriminatory treatment. The Turkish government refuses to recognize the Kurds as a distinct and separate people with their own language, history, culture, identity, and aspirations. Under Turkish law, one may be convicted of the crime of "separatism" for speaking publicly or publishing in Kurdish, or for expressing sympathy for the concept of Kurdish autonomy and self-determination. The PKK is the principal political organization representing the interests of the Kurds in Turkey and has mass support among the Kurds. The PKK has a political wing, known as the National Liberation Front of Kurdistan ("ERNK"), which engages in political organizing and advocacy both inside and outside of Turkey and provides social services and humanitarian aid to Kurdish refugees from Turkish abuses. The PKK also has a military wing, the Kurdish National Liberation Army ("ARGK"), which has engaged in military combat with Turkish armed forces, but has bound itself to the Geneva Convention and Protocols and has renounced terrorism.

29. The LTTE is a political organization that was formed in 1976 by Tamils in the Northern and Eastern Provinces of Sri Lanka, an area known as Tamil Eelam. Sri Lanka is populated by two major groups—the Tamils, who constitute a numerical minority of the population, and the Sinhalese, who constitute a numerical majority. For decades, the Tamils have been subjected to systematic human rights abuses and discrimination on the basis of ethnicity by the Sinhalese, who have controlled Sri Lanka since the nation gained independence from Great Britain in 1948. The LTTE is the principal political organization advocating for the human rights of the Tamils, and for self-determination for the Tamils of Tamil Eelam. In furtherance of its goals, the LTTE engages in political organizing and advocacy, diplomatic activity, the provision of social services and humanitarian aid, the establishment of a quasi-governmental structure in Tamil Eelam, economic development, defense of the Tamil people from Sri Lankan human rights abuses, and military struggle against the government of Sri Lanka.

PLAINTIFFS' INTEREST IN SUPPORTING THE PKK AND THE LTTE

Humanitarian Law Project ("HLP") and Judge Ralph Fertig

30. Since 1991, the HLP and Judge Fertig have devoted a substantial amount of time and resources to advocating on behalf of the Kurds living in Turkey, and to working with and providing training and other forms of support to the PKK in its efforts to protect the Kurds from human rights abuses. Both Judge Fertig and the

HLP are opposed to the use of terrorism. They have sought to assist the PKK and the Kurds in securing human rights only through non-violent means.

31. Judge Fertig and other HLP board members have traveled to Turkey, Kurdish exile communities in Europe, and other locations, to conduct fact-finding investigations, and have interviewed numerous individuals with first-hand knowledge of the relationship between the Turkish government and the Kurds, including members of the Turkish Parliament, journalists, human rights activists, lawyers, academicians, PKK members, and political prisoners.

32. The HLP and Judge Fertig have published many reports and articles presenting their findings and conclusions, which are generally supportive of the PKK and the struggle for Kurdish liberation. They have concluded that the Turkish government is guilty of committing extensive human rights violations against the Kurds, including the widespread use of arbitrary detentions and torture for persons who merely speak out for equal rights for Kurds or are suspected of sympathizing with those who do, the summary execution of more than 18,000 Kurds, and the destruction of more than 2,400 Kurdish villages. In addition, they have concluded that the PKK is a party to an armed conflict governed by Geneva Conventions and Protocols and, therefore, is not a terrorist organization, as that term is understood in international law.

33. Each year since 1991, the HLP has sent a delegation to the U.N. Commission on Human Rights to advocate for the political interests of the Kurds living in Turkey. The HLP delegation has twice submitted reports to the U.N. that have documented human rights

abuses by the Turkish government against the Kurds and have advocated for the right of the PKK to be granted the protections of the Geneva Conventions and Protocols.

34. Since 1992, Judge Fertig and HLP board members acting as individuals have petitioned members of the United States Congress to support human rights for the Kurds, to curtail United States military support to the Turkish armed forces, and to encourage negotiations between the PKK and the Turkish government. Recently, they have petitioned members of Congress to urge Turkey to release four political prisoners, Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, all of whom were elected to the Turkish Parliament in 1991 and are now serving 15-year sentences because the Turkish government has found that they are members or supporters of the PKK.

35. Judge Fertig, acting on behalf of the HLP, has participated in international peace conferences and other meetings where he has assisted members of the PKK and its political arm, the ERNK, in attempting to resolve peacefully the conflict between the Turkish government and the Kurds. In addition, Judge Fertig and other HLP representatives have provided training to some members of the PKK and other Kurds on how to present their human rights claims before the U.N. and other public policy-making bodies, including the United States Congress.

36. Since the PKK was designated as a foreign terrorist organization, the HLP and Judge Fertig have been deterred from continuing to assist the PKK to improve conditions for the Kurds living in Turkey. They want to continue to provide the forms of support they

had previously provided, and would like to provide additional support as well. Specifically, they would like to: (1) engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; (2) provide the PKK and the Kurds with training and written publications on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations; (3) write and distribute publications supportive of the PKK and the cause of Kurdish liberation; (4) advocate for the freedom of political prisoners in Turkey, including Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak; (5) assist PKK members at peace conferences and other meetings designed to support a peaceful resolution of the Turkish conflict; and (6) provide lodging to PKK and ERNK members for pruposes of supporting their lawful political advocacy.

37. In addition, the HLP would like to solicit funds for, and contribute cash to, the PKK's political branch, the ERNK, to support the PKK's lawful humanitarian and political activities, and the Kurdish Red Crescent, a group alleged to be affiliated with the PKK that provides medical aid to Kurds, many of whom are PKK members and supporters who have been wounded in battle with the Turkish armed forces.

38. Judge Fertig would also like to solicit funds for, and make cash contributions to the ERNK, the Kurdish Red Crescent, and the international campaign to free political prisoners Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, solely to promote lawful and non-violent political and humanitarian purposes.

Ilankai Thamil Sangam ("Sangam")

39. The Sangam, as an organization, and many of its members, as individuals, are deeply committed to supporting the humanitarian needs of the Tamils in Sri Lanka, and to that end, would like to solicit and make donations of cash, clothing, food, including prepared foods for infants, and educational materials, to the LTTE to support its efforts to provide humanitarian assistance to the Tamils in Sri Lanka. Among the LTTE efforts that they seek to support are the LTTE-run Chensolai and Kantharupan Orphanages. The Sangam and its members do not seek to support any military or unlawful activities of the LTTE.

40. The fear of criminal investigation, prosecution, and conviction has deterred the Sangam and its members from soliciting and making donations to the LTTE. The Act has also chilled the Sangam and its members from freely engaging in political discussions in which the topic of soliciting and making donations to the LTTE and organizations affiliated with the LTTE is discussed, and in which opinions in support of the LTTE are presented.

Dr. Nagalingam Jeyalingam

41. Dr. Jeyalingam is deeply concerned for the welfare of the Tamils in Sri Lanka, who lack many of the basic necessities of life, including adequate shelter, food, clothing, and medical care. Members of Dr. Jeyalingam's immediate family, including his mother, brothers, and sisters, were displaced from their homes and forced to flee from Sri Lanka to India as refugees in 1983. Prior to October 8, 1997, the date the Secretary

designated the LTTE as a foreign terrorist organization, Dr. Jeyalingam made cash donations to organizations that provided assistance to Tamil refugees in the Northern and Eastern provinces of Sri Lanka. In addition, as a part of his work with the Ilankai Thamil Sangam, he encouraged other Tamil-Americans to provide such assistance.

42. Dr. Jeyalingam disagrees with the Secretary's decision to designate the LTTE as a foreign terrorist organization. He believes that the LTTE plays a crucial role in providing humanitarian aid, social services, and economic development to the Tamils in Sri Lanka.

43. Dr. Jeyalingam wants to support the lawful and non-violent activities of the LTTE in a number of ways. He would like to donate food and clothing to the Tamil Eelam Economic Development Organization ("TEEDOR"), a branch of the LTTE engaged in economic development activities in Tamil Eelam, including assisting refugees, implementing plans to develop the area's agriculture, forestry, fishing, and industries, and conducting environmental surveys. He would like to donate school supplies, books, and other educational materials to the Tamil Eelam Education Secretariat (TEES), a branch of the LTTE that oversees educational services for the children of Tamil Eelam. He would like to donate cash to the LTTE to help pay for its legal fees and costs in the lawsuit it filed challenging the Secretary's designation of it as a foreign terrorist organization, to support its political advocacy work, including its dissemination of written publications describing the plight of the Tamils in Sri Lanka to Tamil exile communities around the world; and to support its provision of medical and rehabilitative assistance to

Tamil victims of landmine explosions through the White Pigeon Organization. Dr. Jeyalingam only wishes to support humanitarian, social, and political efforts, and does not intend to support the LTTE's military activities.

44. Dr. Jeyalingam believes that there is an urgent need for each of the forms of support that he wishes to provide. However, he is afraid to act upon this interest because he fears that doing so would provoke the United States government to criminally investigate, prosecute, and convict him under the Act for providing material support to a designated organization.

Tamils of Northern California ("TNC")

45. The TNC is committed to assisting the Tamils in Sri Lanka, and would like to support the LTTE's efforts to provide humanitarian assistance. In particular, the TNC and its members would like to donate money, as well as children's supplies, including infant formula, baby food, children's shoes and clothing, school books, and toys, to the orphanages that the LTTE runs, including the Chensolai and Kantharupan Orphanages. The TNC and many of its members wish to make donations to the LTTE's humanitarian efforts as a means of expressing their support for the self-determination of the Tamil people in Sri Lanka. The TNC does not seek to support the LTTE's military activities. The TNC and its members are deterred from providing this support to the LTTE by the threat of criminal prosecution under the Act.

World Tamil Coordinating Committee ("WTTC")

46. The World Tamil Coordinating Committee (WTCC) has distributed LTTE literature throughout the United States since 1987, as part of its founding purpose to advocate in this country on behalf of the human rights and self-determination of the Sri Lankan Tamils. The designation of the LTTE on October 8, 1997 has had a devastating impact on the WTCC's ability to meet its institutional goals and to remain solvent. Many individuals who were receiving LTTE literature from the WTTC prior to that date have asked the WTTC to stop distributing to them because they fear that subscribing to receive LTTE-produced materials could lead to their criminal investigation, prosecution, and conviction under the Act for providing material support to a designated organization. In addition, many of the WTCC's former donors have stopped making contributions out of fear of criminal investigation and prosecution for providing material support to the LTTE. The WTTC does not intend any of its activities to further any illegal ends.

Federation of Tamil Sangams of North America ("FETNA")

47. Since the Secretary designated the LTTE as a foreign terrorist organization on October 8, 1997, many of the FETNA's member Sangams and their respective individual members have complained to the FETNA that they would like to make donations to the LTTE for its humanitarian assistance to Tamil refugees in Sri Lanka, but are afraid of being criminally prosecuted under the Act for doing so. The Act has had a chilling effect on the First Amendment rights of the FETNA

and its member Sangams. Not only are the FETNA's member Sangams afraid to make contributions to the LTTE's humanitarian relief efforts, but the FETNA and its members Sangams have been inhibited from freely engaging in political discourse concerning the LTTE and how to address the critical need for humanitarian assistance of the Tamils in Sri Lanka, because the Act also criminalizes conspiring to support the LTTE. The FETNA's members seek to support only the lawful humanitarian projects of the LTTE, and not its military activities.

Tamil Welfare and Human Rights Committee ("TWHRC")

48. The TWHRC's members are deeply concerned about the destitute Tamil refugees in the war-torn areas of Northeast Sri Lanka who have lost their homes and have had their lives disrupted. The TWHRC as an organization, and many of its members as individuals, consider it a matter of the highest urgency to provide humanitarian assistance to these refugees. The TWHRC would like to make cash donations to the major organizations in Sri Lanka that are providing direct relief, medical and social services to these refugees, including the Tamil Eelam Economic Development Organization ("TEEDOR"). The TWHRC seeks only to support the LTTE's humanitarian efforts and does not seek to support the LTTE's military activities.

49. The enactment of the Act and the designation of the LTTE as a foreign terrorist organization have had a pronounced chilling effect on the First Amendment rights of the TWHRC and its members. The TWHRC and its members are afraid to act upon their desire to

provide cash donations to support the provision of humanitarian services to Tamil refugees in Sri Lanka because they fear that doing so would place them at risk of criminal investigation, prosecution, and conviction. Furthermore, the TWHRC and its members are afraid to discuss freely the subject of providing support to the LTTE, and to organizations that collaborate with the LTTE in providing humanitarian services, for fear that they will be criminally investigated, prosecuted, and convicted for attempting and conspiring to assist a designated organization.

IRREPARABLE INJURY

50. All of the plaintiffs are suffering ongoing irreparable injury to their First Amendment rights, because the Act and the Secretary's designation of the LTTE and the PKK have deterred them from engaging in associational and speech activity that is protected by the First Amendment. This injury is exacerbated by the Act [*sic*] vague and open-ended definition of "material support and resources," and by the Secretary's selective targeting of certain disfavored groups for designation.

51. Plaintiffs have no adequate remedy at law.

FIRST CAUSE OF ACTION

52. The allegations contained in paragraphs 1 through 51 above, are repeated and realleged as though fully set forth herein.

53. Sections 302 and 303 of the Act violate the First Amendment to the Constitution's guarantees of freedom of speech and association and to petition the government for a redress of grievances insofar as it makes it a

criminal offense to provide "material support or resources" to a designated organization absent specific intent to further the organization's unlawful ends.

SECOND CAUSE OF ACTION

54. The allegations contained in paragraphs 1 through 51 above, are repeated and realleged as though fully set forth herein.

55. Sections 302 and 303 of the Act violate the First and Fifth Amendments to the Constitution by granting the Secretary of State effectively unreviewable authority to designate foreign organizations as "terrorist," thereby inviting viewpoint discriminatory targeting of particular groups and their supporters based on their political views.

THIRD CAUSE OF ACTION

56. The allegations contained in paragraphs 1 through 51 above, are repeated and realleged as though fully set forth herein.

57. Sections 302 and 303 of the Act violate the First and Fifth Amendments to the Constitution because its definitions of the terms "material support and resources" and "foreign terrorist organization" are impermissibly vague, failing to afford adequate notice to individuals of what is prohibited, giving government officials unfettered discretion in enforcement, and causing individuals to avoid First Amendment protected activity in order to steer clear of the prohibited conduct.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs seek an order and judgment:

1. Preliminarily and permanently enjoining defendants from criminally prosecuting individuals and organizations under §§ 302 and 303 of the Act for providing material support or resources to a designated foreign terrorist organization absent a specific intent to further the organization's unlawful terrorist activities;

2. Declaring §§ 302 and 303 of the Act unconstitutional because they violate the First Amendment and Fifth Amendments [*sic*] to the United States Constitution by criminalizing the act of providing material support or resources to designated foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities;

4.[*sic*] Awarding plaintiffs their costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*; and

5. Granting such other and further relief as the Court may deem just and proper.

Dated: March 19, 1998

Respectfully submitted,

/s/ DAVID COLE
DAVID COLE, ESQ.
c/o Georgetown University Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

/s/ NANCY CHANG
NANCY CHANG, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6420 /-6464

/s/ PAUL HOFFMAN
PAUL HOFFMAN, Esq.
Carol Sobel, Esq.
Center for Constitutional Rights
c/o Bostwick & Hoffman
100 Wilshire Blvd. Suite 1000
Santa Monica, CA 90401
(310) 260-9585

Counsel for Plaintiffs

Visuvanathan Rudrakumaran, Esq.
875 Avenue of the Americas
New York, New York 10001
(212) 290-2925

Counsel for Plaintiff Word Tamil
Coordinating Committee

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos. 03-6107 ABC (RCx) and
98-1971 ABC (RCx)

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

JOHN ASHCROFT, AS ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., DEFENDANTS

May 11, 2005

DECLARATION OF RALPH DAVID HAYS FERTIG

I, RALPH DAVID HAYS FERTIG, declare as follows:

1. I am the President of the Humanitarian law Project ("HLP"), an organization which is a plaintiff in two above-captioned related lawsuits challenging the constitutionality of a federal statute that criminalizes the provision of "material support" to designated foreign terrorist organizations. The first of these suits, No. 98-1971, was filed in 1998, and challenged the material support statute as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A related case, No. 03-6107, was filed in August 2003 and challenges the USA PATRIOT Act's amendment to the definition of "material support" to include "expert advice and assistance." I submitted prior declarations in

case No. 98-1971 on March 9, 1998, and in case No. 03-6107 on September 17, 2003 and December 7, 2003. Congress subsequently amended the relevant provisions of the material support statute, 18 U.S.C. §§ 2339A and 2339B, with the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, § 6603(c)-(f) (Dec. 17, 2004).

2. I attach my prior declarations as Exhibits A, B and C hereto. I submit this declaration to supplement the facts set forth in my prior declarations, and to state some facts and circumstances that have changed since then.

3. The Secretary of State has continued to designate the Kurdistan Workers' Party ("PKK") and the Kurdistan Freedom and Democracy Congress ("KADEK") as "foreign terrorist organizations." On April 4, 2002 (the birthday of the founder of the PKK, Abdullah Ocalan), KADEK (later known as "Kongra Gel"), changed its name back to PKK, the Kurdistan Workers Party.

Political conditions and developments in Turkey

4. The government of Turkey continues to deny many rights to those of its Kurdish residents who seek to nurture or sustain their cultural heritage. Disparities in treatment and protection of Kurds, and restrictions on the rights to free speech or association still oppress the Kurds. Furthermore, Turkey continues to deny equal rights in the economic, social, and political spheres to its Kurdish population. Torture of detainees by the authorities remains a common practice, according to the Human Rights Association of Turkey.

5. The *de jure* acceptance of the Kurds and Kurdish ethnic identity by the Turkish government has not yet been [*sic*] happened: Article 66 of the Turkish Constitution remains the law of the land, which classifies all the citizens of Turkey as Turks. In an incident that sadly illustrates official attitudes, in the city of Mersin on March 21, 2005, thousands of Kurds gathered in the City Square to observe Newroz, the Kurdish New Year. Two youngsters lit a Turkish flag on fire. The incident unleashed a national hysteria, amplified by the official news media, during which the Chief of the Armed Forces stated that the army will fight to its last drop to combat the "so-called citizens" who disrespect the flag—unmistakably a reference to the Kurds.

6. Only a few steps have been taken to placate a European audience that is pushing Turkey to accommodate its Kurds. For example, on June 9, 2004, Turkey, for the first time in its history, allowed limited broadcasting in the Kurdish language. But such broadcasts are restricted to only 30 minutes in Kurmanji dialect and another 30 minutes in Zazaki dialect per week, and the content of the broadcasts is purely historic and contains no discussion of current issues. A few Kurdish language schools have been opened as well, but police surveillance of the schools has intimidated people from attending them.

7. Kurdish Parliamentarians Leyla Zana and Orhan Dogan are again facing trial for their exercise of speech. Zana and Dogan, elected as representatives to the Turkish Grand National Assembly on October 20, 1991, were stripped of their legislative immunity and jailed on March 4, 1994 on the charge of having separatist thoughts and making speeches that encouraged sepa-

ratist aspirations. They were each convicted on December 8, 1994 for 15 years in jail and served until June 9, 2004, when, bowing to pressure from the European Union, Turkey released them. But the Turkish government, arguing that they are not sufficiently repentant for having spoken out, is now seeking to return them to jail to serve the balance of their sentences.

8. As recently as February 8, 2005, the European Court of Human Rights in Strasbourg (set up by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights) censured Turkey for violating the right to free speech of a Kurd, jailed because a book he published was considered separatist Kurdish propaganda. "The tenor of the book was not such as to justify the applicant's criminal conviction," the court ruled, according to a press release. The author, Muzaffer Erdost, now 73, a Turkish national belonging to the Kurdish minority, was jailed for a year in 1997 for his book published a year earlier and relating how extrajudicial persecution had led to bloodshed in the Kurdish town of Sivas in 1978, 1993 and 1996. A public prosecutor had applied to the Ankara State Security Court for an order for the book, called "Three Sivases, in the center of the pressure being exerted for the imposition of a new [Treaty of] Sevres on Turkey," to be seized, saying it contained separatist propaganda representing a threat to Turkish state integrity. The largely Kurdish area of southeastern Turkey has been seeking autonomy, leading to large-scale repression by Turkish authorities of Kurdish militants. (Under the 1920 Treaty of Sevres, part of the post-World War I settlement, the victorious allies promised autonomy for the Kurds of southeastern Turkey [*sic*]. The court ruled that the jail sentence and the

book's confiscation "did not meet a pressing social need and was accordingly not necessary in a democratic society." It said there had been a violation of Article 10 of the European Human Rights Convention (guaranteeing freedom of expression). It acknowledged that passages from the book contained references to people from different ethnic origins and to the founding of a Kurdish state on the collapse of the Republic of Turkey. "However, those references were quotations from articles in the press which could not of themselves justify the interference with the applicants [*sic*] right to freedom of expression," it found. The court also ruled that the plaintiff had been denied the right to a fair hearing "on account of the State Security Courts [*sic*] lack of independence and impartiality." It awarded him 7,500 euros (9,600 dollars) damages plus costs.

9. Extra-judicial killings directed at Kurds still take place. Mardin Ahmet and his son, Ugur Kaymaz, an eleven year old child, were killed by four policemen in Mardin. The child, dressed in his slippers, was shot in the back on suspicion of being a terrorist. The policemen have been reinstated and reassigned.

Recent activities of Humanitarian Law Project

10. In August, 2004, I was called and invited to meet with A. Engin Ansay, the Consul General of the Republic of Turkey. The meeting was set for Thursday, August 12, 2004, and I arranged for the executive director of HLP, Lydia Brazon, to join me. We met on that date, at 11:00 a.m. with Consul General Ansay and his Assistant in the office of the Consulate General of the Republic of Turkey at 4801 Wilshire Blvd., Suite 310, in Los Angeles, California, 90010. Mr. Ansay told Ms. Brazon

and me that at a regular session of the United Nations Human Rights Subcommission in Geneva Switzerland, two individuals who identified themselves as delegates of the Humanitarian Law Project/International Educational Development (HLP/IED)[1] spoke out against actions by the Turkish government in the oppression of Kurds within the boundaries of the Republic of Turkey. Mr. Ansay claimed that through his access to classified files of both the Turkish and the United States government, he was assured and had determined that those individuals were members of the Kurdistan Workers Party (PKK), and that having them speak as delegates of the HLP/IED discredited our organization. He promised to give Ms. Brazon and me redacted copies of the reports spread before him, and to which he referred, which made such allegations. He never did.

11. Mr. Ansay's statements were clearly understood as a warning to HLP/IED that he was watching our organization and, should any link be shown between the PKK and HLP/IED, he would alert the authorities of the United States government.

12. The credentialing of our delegates is undertaken by the headquarters office of HLP/IED in Los Angeles, California, on forms signed by Ms. Brazon and myself and sent to the United Nations headquarters office in New York, N.Y. Those persons named by Consul General Ansay were never credentialed by either Ms. Brazon nor myself. However, Karen Parker, HLP/IED senior delegate to the United Nations Human Rights Subcommission, does occasionally deputize personnel to assist her in discharging her duties for the organization.

---

[1] The relationship between HLP and IED is described in detail in my earlier declaration of March 9, 1998 at ¶¶ 4-5.

13. I promptly contacted Ms. Parker, and asked her if she had deputized such persons, and she assured me that she had not. However, in an abundance of caution, I issued notice that nobody may speak for HLP/IED without clearance from our Los Angeles office, and that such clearance would have to include a good faith effort to determine if there were any ties between a prospective delegate under the aegis of HLP/IED and the PKK.

14. However, since it is literally impossible for HLP/IED to determine whether any person actually belongs to or owes allegiance to the PKK, and since the law as I understand it would penalize members of HLP/IED for giving delegate status to one who holds membership or owes allegiance to the PKK, the effect of Consul General Ansay's warning to our organization is to block us from deputizing anyone to speak out against the oppression of the Kurds by the Turkish government.

15. The fear of being charged with violations of the material support statutes or conspiracy to commit such violations has left the leadership of HLP/IED unsure of how to screen speakers at events sponsored or organized by HLP/IED to prove that they are not affiliated with any designated foreign terrorist organizations. Because of this fear of prosecution, our organization is inclined to not permit people who cannot be effectively screened speak at events sponsored by HLP/IED in the future.

16. Because of the broad language of the law, we have also felt it necessary to request resumes and references for speakers at HLP/IED events and individuals who will otherwise be associated with HLP/IED, even where there is no reason whatsoever to suspect their involvement in terrorist activity.

17. Only recently I withheld credentialing specific individuals, including at least one who had previously spoken in our behalf. In March 2005, I withheld credentials for Karen Nurcan Gulabi and Deniz Alkan; we had previously allowed Mr. Alkan to speak for HLP.

18. HLP has also been making efforts on behalf of Kurds in Iraq—advocating independence, autonomy, federated status, self-government in Kirkuk, and so forth. I attended conferences for these purposes in San Diego and Los Angeles during 2004. There are allegations that Kurdish forces in Iraq are allied with th PKK, which also chills our speaking out in behalf of the Kurds of Iraq.

Activities HLP wishes to carry out, but is deterred from

19. HLP/IED has conducted no training nor provided any assistance of any sort since and due to the vacating of the injunction. Because of the provisions of the revised material support statute, HLP/IED is afraid to engage in such activity, even though its activities would be limited to providing training for and assistance in peaceful human rights alternatives to the violence to which Kurds are subjected; providing assistance and training in peacemaking negotiations; and assisting the PKK in appearing before national and international representative bodies such as the United Nations Human Rights Subcommission, the Council of Europe, the United States Congress, and international human rights conferences. The training, advice, and assistance that HLP wishes to carry out might be construed as providing services, training, expert advice or assistance, or personnel acting under "direction and control" of PKK

or other banned groups, and therefore we risk criminal prosecution if we undertake it.

20. In particular, HLP members and I would like to be able to provide training and expert advice and assistance to Kurds, some of whom are members and/or supporters of PKK, on how to bring claims and appeals of Kurds before the UN and other policy making bodies, as described in my March 9, 1998 declaration at ¶¶ 17-18. However, we are afraid to do so because of the material support statute's prohibitions on providing "services," "personnel," "expert advice and assistance," and of course "training" (even when the latter term is limited to "a specific skill as opposed to general knowledge, 18 U.S.C. § 2339A(b)(2)). We have established and specialized expertise in the area of human rights advocacy, and thus our provision of assistance and training would appear to fall within the still-broad definitions of the material support statute.

21. As described in my March 9, 1998 declaration, ¶¶ 19 *et seq.*, HLP/IED would like to solicit funds for and make cash contributions to the political branch of the PKK (the National Liberation Front of Kurdistan, or ERNK), the Kurdish Red Crescent (Heyva Sor a Kurdistane), and also for the lawful, non-violent activities of the PKK and its successor and affiliate groups. However, HLP/IED and I are afraid to solicit or provide funds for any of these organizations because the statute makes it a crime to provide "material support or resources" to a designated foreign terrorist organization.

Conclusion

22. HLP and its members do not support terrorism, and do not intend to support any unlawful or violent activites of the PKK and its successor and affiliate groups. We seek to support only those groups' lawful, nonviolent activities.

23. HLP/IED and I have been deterred from providing any such aid that might be characterized as "material support or resources" since the enactment of the December 17, 2004 amendments to sections 2339A and 2339B, and, indeed, since the enactment of the USA PATRIOT Act. Virtually everything we have done or wish to do in support of the PKK and its successor and affiliate groups to encourage them to pursue peace and human rights advocacy could be characterized as "material support[.]" HLP/IED and I would continue to provide support to the lawful, nonviolent activities of the PKK and its successor and affiliate groups, as soon as practicable after this Court issues an injunction barring the government from prosecuting us under the "material support" statute for supporting lawful, nonviolent activities of these groups.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ RALPH FERTIG
RALPH DAVID HAYS FERTIG

Executed on May 11, 2005
Los Angeles, California

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 03-6107 ABC (RCx)

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

JOHN ASHCROFT, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Dec. 7, 2003

DECLARATION OF RALPH DAVID HAYS FERTIG

I, Ralph David Hays Fertig, declare that the following statements are true to the best of my knowledge, information, and belief:

1. The Humanitarian Law Project (HLP) and I are plaintiffs in two suits challenging the constitutionality of a federal crime that proscribes the provision of "material support" to designated foreign terrorist organizations. This crime was put into law by the Anti-terrorism and Effective Death Penalty Act of 1996. The first of these suits was filed in 1998, and on March 9, 1998, I filed a declaration under penalty of perjury in support of that suit ("1998 Declaration"). The instant suit is the second of these suits, and it challenges the USA PATRIOT Act amendment to the definition of "material support" to include "expert advice and assistance." The instant suit was filed in August 2003, and on September

17, 2003, I submitted a declaration under penalty of perjury in support of the pending motion for summary judgment.

2. I submit this declaration to ensure that the record in this case includes the facts set forth in my 1998 Declaration, and to state some facts and circumstances that have changed since then. The 1998 Declaration, which is submitted in its entirety as Exhibit 1, clearly establishes the expertise of the HLP and myself in international human rights, peacemaking, and advocacy before official bodies. As described in that declaration, the HLP is a longstanding non-profit organization with an international focus that is dedicated to protecting human rights and promoting the peaceful resolution of armed conflicts. The HLP has consultative status to the United Nations and regularly participates as a credentialed representative in meetings of the UN Subcommission on Human Rights in Geneva, Switzerland. It also advocates before the United States Congress. In addition, the HLP conducts fact-finding, and writes reports, on human rights problems all over the world. As the President of the HLP since 1989, I have personally participated in the HLP's advocacy and fact-finding work, including work in support the Kurds in Turkey, and I have assisted with the publication of the HLP's report, Armed Conflict in the World Today, which was last updated and issued in 2000.

3. The Secretary of State has continued to designate the PKK as a "terrorist organization," and states that it is also known as KADEK (Kurdistan Freedom and Democracy Congress), among other names. While the Humanitarian law Project and I dispute the designation of the PKK and its successor, KADEK, as terrorist organi-

zations, I will refer herein to these organizations, designated by the Secretary of State as terrorist, collectively as "the PKK and its successor or affiliate organizations."

4. In 2001, I retired from my position as an Administrative Judge for the United States Equal Employment Opportunity Commission, and in January, 2003, I joined the faculty of the Graduate School of Social Work at the University of Southern California where I am now a full-time clinical Professor, teaching Social Welfare history, Philosophy, and Policy, Industrial Social Work, and Law and Social Work.

5. During the period when the HLP and I were protected by this Court's injunctions, and until the enactment of the USA PATRIOT Act, both the HLP and I continued to provide support to the PKK or its successor or affiliate organizations in the following ways:

(a) The HLP delegation to the United Nations Human Rights Subcommission regularly included persons who belonged to the PKK or its successor or affiliate organizations. HLP advised such persons and assisted them in participating in the proceedings.

(b) The HLP staff helped persons who belonged to the PKK or its successor or affiliate organizations to make presentations to the UN Subcommission on Human Rights through "Round Tables," Information Meetings, and papers addressing human rights issues and the oppression of Kurds in Turkish occupied Kurdistan.

(c) The HLP worked with Special Rapporteurs of the UN Subcommission on Human Rights in behalf of human rights for the Kurds of Turkish occupied Kurdistan.

(d) The HLP and I continued to provide training to persons who belonged to the PKK or its successor or affiliate organizations to help them bring their claims and concerns before legislative bodies and the United Nations.

6. As stated in my September 17, 2003 declaration, the HLP and I have been deterred from providing any such aid that might be characterized as "expert advice or assistance" since the enactment of the USA PATRIOT Act. Virtually everything we have done in support of the PKK and is successor and affiliate groups to encourage them to pursue peace and human rights advocacy could be characterized as "expert advice or assistance."

The HLP and I would continue to provide such assistance to the PKK and its successor and affiliate groups, now designated as "terrorist" by the Secretary of State, as soon as practicable after this Court issues an injunction barring the government from prosecuting as under the "expert advice or assistance" prong of the "material support" statute. We are committed to continuing to provide assistance for human rights of the Kurds in Turkey, and continue to believe that it is our constitutionally-protected right to do so.

I declare, under the penalty of perjury, that the foregoing is true and correct.

/s/ (ORIG FILED AND SIGNED ON 12/7/03)
RALPH DAVID HAYS FERTIG

Dated: December 7, 2003
Los Angeles, California

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 03-6107 ABC (RCx)

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

JOHN ASHCROFT, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Sept. 17, 2003

DECLARATION OF RALPH DAVID HAYS FERTIG

I, Ralph David Hays Fertig, declare that the following statements are true to the best of my knowledge, information, and belief:

1. I am the President of the Humanitarian Law Project (HLP). The HLP and I are plaintiffs in this action filed in August 2003, and I submit this Declaration on our behalf. The HLP and I are also plaintiffs in a related lawsuit, filed in March 1998, in we challenge the constitutionality of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) insofar as it makes it a crime to provide "material support or resources" to the lawful activities of designated foreign terrorist organizations, including the Kurdistan Workers' Party (PKK). On October 8, 1997, the United States Secretary of State designated the PKK as a foreign terrorist orga-

nization under the AEDPA, and it has remained designated since that time.

2. In June 1998, Judge Audrey Collins issued an injunction in the first of these suits that bars the government from prosecuting the HLP or me under the challenged material support provision for providing "personnel" and "training" to the PKK. On October 26, 2001, however, the challenged law was amended by the USA PATRIOT Act to make it a crime to provide material support to a designated foreign terrorist organization in the form of "expert advice or assistance."

3. Between the time the injunction was issued in June 1998 and the time the law was amended in October 2001, the HLP and I provided support to the PKK that could be construed as falling within the rubric of "personnel" and "training," as well as under the rubric of "expert advice or assistance." These activities included advising Kurds and Kurdish groups on the latest developments in the evolution of international human rights law, the procedures for seeking review by the newly established International Criminal Court, and advocacy of the rights of Kurds before the Human Rights Subcommission of the United Nations. Since the challenged law was amended to include "expert advice or assistance" as a form of "material support," however, the HLP and I have refrained from providing any support to the PKK out of fear that doing so might subject us to criminal prosecution for providing "expert advice or assistance" to the PKK. We very much wish, however, to provide the following support to the PKK, which could be characterized as "expert advice or assistance": expert advice and assistance in human rights advocacy, peacemaking negotiation skills, and advocating their

message to legislative bodies throughout the world, including the United States Congress.

4. I firmly believe that the HLP and I have a right under the First Amendment to provide expert advice and assistance towards the lawful and peaceful goals of the PKK and Kurds who are members of tile PKK in the manner described in this declaration. However, we do not wish to run the risk of being subjected to a criminal prosecution under the challenged law. For this reason, we are refraining from engaging in these activities, and we are requesting that this court issue a declaratory judgment, on an expedited basis, that the USA PATRIOT Act amendment to the material support law barring the provision of "expert advice and assistance" is unconstitutional insofar as it makes it a crime for us to provide expert advice or assistance to the PKK in the manner described in this declaration.

I declare, under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 17th day of September, 2003.

/s/ RALPH D.H. FERTIG
RALPH DAVID HAYS FERTIG

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-1971 (RCx)

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

JANET RENO, AS ATTORNEY GENERAL
OF THE UNTIED STATES, ET AL., DEFENDANTS

Mar. 9, 1998

DECLARATION OF RALPH D.H. FERTIG

I, Ralph David Hays Fertig, declare that the following statements are true to the best of my knowledge, information, and belief:

1. I am a citizen of the United States of America, where I was born, raised, and educated. I am currently employed as an Administrative Judge for the United States Equal Employment Opportunity Commission. My professional careers and my extra-curricular activities span more than half a century of work focused on human rights in the United States, as well as abroad. Before becoming a lawyer, in 1980, I was a social worker, sociologist, city planner, college lecturer, writer, consultant, and agency executive. From June 1988, until I was appointed as an Administrative Judge in October, 1994, I was the Supervising Trial Attorney for the EEOC in Los Angeles. For eight years prior thereto, I

was an attorney in private practice, focusing on civil rights litigation. My resume is attached hereto and incorporated fully herewith. My home address is: 927 Thayer Avenue, Los Angeles, California 90024.

2. I am currently the President of the International Educational Development Inc./Humanitarian Law Project (hereinafter Humanitarian Law Project or HLP). I have been a member of the Board of the HLP since 1989. I have personally participated in the HLP's delegations to Turkey, El Salvador, Mexico, and the United Nations Human Rights Commission in Geneva, Switzerland. Both the HLP and I are unalterably opposed to all acts of terrorism.

3. I submit this declaration on behalf of the HLP and on my own behalf, in support of a lawsuit challenging the constitutionality of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) insofar as it makes it a crime to provide "material support or resources" to the lawful activities of designated foreign terrorist organizations, including the Kurdistan Workers' Party (PKK). On October 8, 1997, the United States Secretary of State designated the PKK as a foreign terrorist organization under the AEDPA. On information and belief, the PKK vigorously disputes the designation. It has renounced terrorism, has twice announced a unilateral cease fire, committed itself to be bound by the Geneva Protocols, and in recent years has conducted itself in keeping with them. After learning of the designation of the PKK as terrorist, I pursued legal options with attorneys in the United States for challenging it. However, I could not find a lawyer willing to represent the PKK within the thirty day window provided by the law. I reached the PKK command through a

journalist who advised them that under the terms of the AEDPA, it would likely not be allowed to review the government's file on which such designation was based. The lawyers I consulted and the PKK command each concluded that such challenge would be futile and even if an attorney could be engaged, it would be too costly for the PKK to pursue.

THE HLP'S MISSION AND THE WORK IN WHICH IT IS ENGAGED, INCLUDING ITS EFFORTS TO SECURE PEACE IN TURKISH OCCUPIED KURDISTAN

4. The HLP is a non-profit organization recognized under the California Franchise Tax Board which holds status under the United States Internal Revenue Code Section 501(c)(3). The International Educational Development, Inc. (IED) was formed in the 1950's by a group of Jesuit Fathers for charitable and educational purposes under Section 501(c)(3) of the United States Internal Revenue Code to serve as the secular arm of their projects overseas and to help them conduct non-sectarian work to aid schools, hospitals, and impoverished third world communities. As a non-profit corporation, the IED contracted with the United States Agency for International Development to secure and distribute development materials, including military surplus trucks, lumber, and building supplies, to various schools, hospitals, and projects including, but not limited to, Jesuit missions in the Third World. The IED was chartered as a Non-Governmental Organization ("NGO") of the United Nations by Dag Hammarsjold with consultative status to the United Nations Commission on Human Rights, a status that it hold to this day. In approximately 1985, the Humanitarian Law Project was formed, ini-

tially as a component of the Archbishop Oscar Romero Relief Fund, founded by Sister Pat Krommer, C.S.J., of the Sisters of St. Joseph Carondolet.

5. In approximately 1986, the Humanitarian Law Project established itself as a private non-profit organization with its own Board of Directors. In 1989, the IED absorbed the Humanitarian Law Project into its operation, and the members of the Board of Directors of the HLP were elected to the Board of Directors of the IED. The combined HLP organization is currently headquartered at 8124 West Third Street, Suite 105, Los Angeles, California, 90048.

6. The HLP is dedicated to protecting human rights and promoting the peaceful resolution of armed conflicts and world-wide compliance with humanitarian law and human rights law. Advocacy for the rights of people oppressed by the governments of lands they occupy is at the very heart of the HLP's function and purpose. The HLP has consultative status to the United Nations and regularly participates in meetings of the United Nations Commission on Human Rights in Geneva, Switzerland. Its delegations to the United Nations have included volunteer human rights lawyers and activists from the United States, Bosnia, El Salvador, Mexico, Japan, Russia, Sri Lanka, Kurdistan, and other nations. They have long been in the forefront in advocating peaceful resolution of armed conflict situations. The HLP has established an Advisory Board, a Law Commission, a Social Science Commission, a Medical Commission, and various projects on which other volunteers participate. The HLP's Board of Directors includes lawyers, academicians, businessmen, clergy, writers, producers, and a member of the House of

Lords of Great Britain. The organization's Commissions and Projects are similarly constituted, and include a several elected officials, including a member of the Mexican Senate and a delegate to the South Korean National Assembly, actors and human rights activists.

7. The HLP regularly sends delegations to observe and report on human rights issues in locations across the globe, including Turkey, Mexico, Guatemala, El Salvador, Nicaragua, and Sri Lanka. Each year, an HLP team, led by Karen Parker, Esq., participates in the meetings of the United Nations Human Rights Commission in Geneva, Switzerland. Karen Parker, who is based in San Francisco, California, is joined by other HLP delegates from the United States and from other nations, including Turkey, Russia, Bosnia, Japan, Sri Lanka, Mexico and El Salvador.

8. Most armed conflicts today take place within national boundaries and it is on such conflicts that the HLP focuses much of its work. Civil wars, as defined by Article I of Protocol Additional II to the Geneva Conventions, involve armed conflict between government armed forces and the armed forces of opposition groups under responsible command and in control of sufficient territory to enable them to carry out sustained and concerted military operations. Where civil wars exist, all customary humanitarian law of civil wars (Common Article 3 of the Geneva Conventions) apply and, where applicable, Protocol Additional II to the Geneva Conventions, applies. The HLP's 1997 report, Armed Conflict in the World Today, identifies civil wars or wars of national liberation in Acheh, Afghanistan, Angola, Armenia, Azerbaijan, Bosnia- Herzegovina, Bougainville/Papua- New Guinea, Burma, Burundi, Cambodia,

Chechnya/Russian Federation, Croatia, Cyprus, East Timor, Georgia, Guatemala, Iran, Iraq, Israeli Occupied Territories and Southern Lebanon, Kashmir, Liberia, Mexico, Moluccas, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan, Tajikstan, Tibet, Turkey, Uganda, Western Sahara, and Zaire) [*sic*]. In addition, it identifies sixteen nations that are plagued with violent social unrest.

9. In contrast, there are only five "nascent" international conflicts. Thus, the peace-seeking activities of the HLP primarily require attention to conflicts that take place within national boundaries.

10. Since 1991, the HLP has expended a substantial portion of its resources in efforts to secure peace in Turkish occupied Kurdistan. The HLP's delegates to the United Nations have consistently advocated for the right of the PKK to be granted the protection of the Geneva Conventions and Protocols. In addition, the HLP's Board and Advisory Board members have written to, and met with, members of the United States Congress to request Congressional support for the rights of the Kurds in Turkey to assert their ethnic heritage and speak their own language; to be free from arbitrary arrest and detention, torture, and summary execution and to be allowed to assemble, form groups and associate with—among others—the PKK. HLP's Board and Advisory Board members and I have also urged members of Congress to encourage negotiations between the leaders of the PKK and the Turkish government; and to fulfill the promise made by President Woodrow Wilson in his 14 point peace plan following World War I, i.e., to allow the Kurds in Southeast Anatolia to determine their own

destiny through a plebiscite in the region that would be respected by Turkey.

POLITICAL ADVOCACY IN BEHALF OF THE KURDS AND THE PKK BEFORE THE UNITED NATIONS AND THE UNITED STATES CONGRESS

11. On behalf of the HLP and in my individual capacity, I have devoted a considerable amount of time and resources to travelling, studying, writing, and reporting upon the denial of human rights to the Kurds in Turkey. In 1991, I first visited Turkey to study the plight of the Kurds. During this visit and subsequent visits to Europe, I interviewed members of the Turkish Parliament, journalists, human rights activists, lawyers, academicians, and PKK members and other individuals with first hand experience in the struggle of the Kurdish people to secure acknowledgment of their ethnic heritage and the right to express it in Turkey. In addition, I secured testimony from persons who were held in Turkish prisons where they had been beaten, tortured, and hung by their wrists, had electrical prods applied to their genitalia, and were harshly punished merely because they had spoken or written in behalf of equal rights for the Kurds. I also obtained evidence of the presence of the PKK and its affiliated military wing, the Kurdish National Liberation Army (ARGK) within the political boundaries of the state of Turkey, of its maintenance of a command structure, and of its willingness and capacity to be bound by the Geneva Protocols and Conventions and by international humanitarian law.

12. From my visits to Turkey and to Europe where I have met with Kurds in the diaspora, I have learned

that there is massive popular support among the Kurdish people for the PKK and its political wing, the National Liberation Front of Kurdistan (ERNK). The PKK has been the driving force behind most of the expressions by the Kurdish people to seek human rights in Turkey since 1984. The PKK has broad popular support throughout the predominantly Kurdish region of Southeast Turkey and in the Kurdish diaspora, which is concentrated in Western and Northern Europe.

13. On July 10, 1991, I wrote a report for the HLP which concluded that the PKK met all of the stated criteria entitling it to the protection of the Geneva Conventions and Protocols. This report, which was submitted to the United Nations Human Rights Commission on two separate occasions, documents that the government of Turkey denies human rights to the Kurds and violates international humanitarian law as framed by the Geneva Protocols additional to the Geneva Conventions of 12 August 1949. The PKK and ERNK have used the report, including updated versions of it, to support their claims of Turkey's violation of human rights, and attorneys representing captured members of the ARGK in Turkish courts have used the report in seeking the protection of the Geneva Protocols.

14. In each year since 1991, the HLP delegation to the United Nations Human Rights Commission has advocated the binding of Turkey to the Geneva Conventions and Protocols, which would extend some protections for non-combatants in Turkish occupied Kurdistan as well as to the PKK and Turkish armed forces. In 1992, I joined Karen Parker in leading the HLP's delegation to the UN Human Rights Commission in Geneva and in speaking out for recognition of the applicability

of the Protocols and Conventions to the armed conflict in Turkish occupied Kurdistan. In the years prior and subsequent to 1992, Karen Parker has led the HLP delegations to the UN Human Rights Commission, and she has consistently urged that same cause.

15. Since 1992, I, on behalf of the HLP and in my individual capacity, along with many other HLP Board and Advisory Board members, have regularly met with members of the United States Congress and their staff to urge them to support human rights for the Kurds in Turkey and to help secure a peaceful resolution of the conflict between the Turkish government and the Kurds. We have provided members of Congress with documentation of the human rights abuses committed by the Turkish government and its armed forces against the Kurds. We have urged Congress to curtail United States military supplies for the Turkish armed forces, as those supplies are largely used to oppress the Kurds and to battle the PKK.

16. The HLP and I would like to continue to offer our services to advocate on behalf of the rights of the Kurdish people and the PKK before the United Nations and the United States Congress. However, we are afraid to do so because of our concern that, under the AEDPA, our advocacy could constitute the criminal provision of "material support or resources" to a designated foreign terrorist organization. "Material support or resources" is defined broadly under the AEDPA to include the provision of "personnel." The AEDPA further makes it a crime to "attempt[] or conspire[]" to provide "material support or resources" to a foreign terrorist organization. We are concerned that our contribution of personnel and resources to advocate for the PKK may violate

the law, but we believe it is our First Amendment right to do so.

TRAINING THE KURDS AND THE PKK TO ADVOCATE BEFORE THE UNITED NATIONS AND NATIONAL GOVERNMENTS

17. Since 1992, Karen Parker and I, on behalf of the HLP, have provided training to Kurds, some of whom are members and supporters of the PKK, on how to bring the claims and appeals of the Kurds and the PKK for human rights before the United Nations and other public policy making bodies, including the United States government and other national governments. We have provided such training in Brussels, Rome, Geneva, Los Angeles, and other cities in the United States. I have provided training to members of the *Kurdistan Parliament in Exile* on international human rights law and on approaches to take before other governmental bodies, and in both my individual capacity and for HLP, I would like to be able to continue providing this training. The *Kurdistan Parliament in Exile* is a parliamentary body, based in Brussels, Belgium, consisting of representatives elected by Kurds throughout the diaspora. Among those elected, there may be members of the PKK, and in its work, the *Kurdistan Parliament in Exile* may cooperate with the ERNK in lawful campaigns for the rights of all people in Turkish occupied Kurdistan to be free from oppression, and in seeking peaceful solutions to the current conflict there.

18. The HLP and I would like to continue providing training to the Kurds and the PKK. However, we are afraid to do so lest we be found guilty of a criminal violation of the AEDPA. The AEDPA broadly defines the

provision of "material support or resources" to a designated foreign terrorist organization to include the provision of "training."

SOLICITING FUNDS FOR, AND MAKING CASH CONTRIBUTIONS TO THE LAWFUL ACTIVITIES OF THE PKK AND THE KURDISH RED CRESCENT

19. The HLP would like to solicit funds for and make, cash contributions to support the non-violent political work that is being performed by the PKK's political branch, the ERNK, as well as the lawful, non-violent activities of the PKK, including the PKK's provision of humanitarian relief to Kurds and Kurdish refugees.

20. The HLP would also like to solicit funds for, and make, cash contributions to, *Heyva Sor a Kurdsistane* (the Kurdish Red Crescent), a group that provides medical aid to Kurds, many of whom are PKK members and supporters, who have been wounded in battle with the Turkish Armed Forces. The Kurdish Red Crescent is considered by the Turkish government to be affiliated with, and a front organization for the PKK. The Kurdish Red Crescent is not recognized by the International Committee of the Red Cross, which relies upon the Turkish Red Crescent exclusively to provide medical aid to persons in Turkish occupied Kurdistan. Under the AEDPA, the Kurdish Red Crescent's aid to wounded members of the ARGK may be construed as aid to the PKK.

21. In my individual capacity, I would like to solicit funds for, and make a cash contribution to the ERNK to

support its efforts to provide humanitarian relief to Kurdish refugees who have been displaced from their homes by the Turkish armed forces and helping them find sanctuary, housing, food, jobs, material and moral support in the diaspora and to organize lawful popular and political support for the rights of the Kurds to be free from oppression by the Turkish armed forces and to be granted human rights in Turkish occupied Kurdistan.

22. I would also like to solicit funds for, and make a cash contribution to, in my individual capacity, the Kurdish Red Crescent, so that it can continue to provide medical assistance to Kurds, including PKK members and supporters, who have been wounded in battle with the Turkish armed forces.

23. However, the HLP and I are afraid to solicit funds for, or provide funds to, the PKK, or any organization that may be affiliated with the PKK or the Kurds, because the AEDPA makes it a crime to provide "material support or resources" to a designated foreign terrorist organization.

POLITICAL ADVOCACY IN BEHALF OF AND SOLICITATION OF FUNDS FOR LEYLA ZANA, HATIP DICLE, ORHAN DOGAN, AND SELIM SADAK

24. On behalf of the HLP and in my individual capacity, I have participated in the international campaign to free Leyla Zana, the first Kurdish woman elected to the Kurdish Parliament, and Hatip Dicle, Selim Sadak, and Orhan Dogan. Leyla Zana was elected in October, 1991, along with Hatip Dicle, Selim Sadak, and Orhan Dogan, all four as representatives of the Social Demo-

cratic Populist Party (SHP). While in office, these four resigned from the SHP and joined the People's Labor Party (HEP). In 1993, HEP was closed down by the Turkish government under charges of "separatism." Leyla Zana and the other three deputies then joined the newly formed Democracy Party (DEP). On March 2, 1994, Ms. Zana's parliamentary immunity and that of the three other deputies was lifted and they were all arrested and held incommunicado for 12 to 14 days before being committed to prison. Detention unsupervised by a judge constitutes a breach of Article 5 of the European Convention for the Protection of Human rights and Fundamental Freedoms. On November 26, 1997 the European Court of Human rights ruled that their incommunicado detention was unlawful and breached Turkey's Commitments under the Convention. The four deputies were charged with aiding the PKK and brought to trial at Ankara State Security Court on August 3, 1994.

25. The testimony connecting them to the PKK was found by *Amnesty International* to be "highly suspect . . . obtained from people who themselves faced prosecution, but who had turned state's evidence in return for a lighter punishment, or from people who later retracted their statements claiming that these had been extracted under torture." (in *Turkey: The colours of their clothes: parliamentary deputies serve 15 years' imprisonment for expressions of Kurdish political identity*, Amnesty International, December, 1997). Amnesty International has named all four deputies "Prisoners of Conscience." *Id.* On December 8, 1994, Ms. Zana and the three other deputies were convicted by the Turkish courts of membership in the PKK, and sen-

tenced to 15 years in prison. The HLP and I have solicited money for the campaign to free Ms. Zana. In addition, I have written articles and met with members of the United States Congress to encourage support for her release from imprisonment in Turkey.

26. However, upon learning that the PKK was listed as a terrorist organization on October 8, 1997, I have become apprehensive about soliciting money and advocating for the freedom of persons convicted of being members of the PKK, lest my actions amount to the crime of providing "material support or resources" to a designated foreign terrorist organization under the AEDPA.

TRAVEL TO TURKEY AND PARTICIPATION IN PEACE CONFERENCES WITH KURDS AND THE PKK

27. On behalf of the HLP and in my individual capacity, I have traveled extensively to participate in peace conferences with the Kurds and the PKK. In 1994, I traveled to Brussels, Belgium to meet with members of the Kurdistan Government in Exile and to participate in an international conference seeking peace in Turkey. I participated together with members of the PKK and its political arm, the ERNK in developing strategies and programs to help bring peace to Turkish occupied Kurdistan.

28. In April, 1997 I traveled to Rome to participate in an international conference, Pace in Turchia, with members of the PKK and other Kurdish groups, along with representatives of various sectors of Turkish society and delegates from other nations, to try to build a dialogue with these factions. I met with persons who

are members of the PKK and drafted a statement on their behalf seeking a peaceful resolution of the current conflict in Turkish occupied Kurdistan. Following the Rome conference, I traveled to London where I met with Kurds in the diaspora. I advised them of their rights under international law and provided them with some of my writings, as well as some training in advocating the cause of Kurdish human rights and liberation.

29. I have been asked to attend other conferences, meet with groups of Kurds in the diaspora, and revisit Turkey. However, since the PKK was cited as a "terrorist organization" on October 8, 1997, I have been afraid to attend any conferences or meetings at which PKK members or supporters would be present. I am concerned that by providing advice and assistance to members and supporters of the PKK, I could be charged with providing "material support or resources" in the form of "personnel" under the AEDPA.

THE WRITING OF PUBLICATIONS IN SUPPORT OF KURDISH LIBERATION AND THE PKK

30. Since 1991, I have written many articles in both my individual capacity and on behalf of the HLP documenting the state of civil conflict in Turkish occupied Kurdistan; the widespread use of arbitrary detention and torture for persons who merely spoke out for equal rights for Kurds or were suspected of sympathizing with those who do, including attorneys, doctors, and clergy who provided assistance to the Kurds and writers who published news of the oppression of the Kurds; the summary execution of more than 18,000 Kurds; and the wholesale destruction of some 2,400 Kurdish villages.

Some of my articles have been reprinted in a variety of publications and translated into German, French, Turkish, Kurdish, and other languages. I do not know whether or not any of the publishers are connected to the PKK, but my articles certainly document a situation that the PKK seeks to bring to world attention, namely that Kurds are denied fundamental human rights by the government and armed forces of Turkey.

31. I am opposed to the use of violence and wish to assist the Kurds and the PKK in using non-violent means to secure human rights. I believe that it is vital for the Kurds and the PKK to learn of developments in international law, including decisions under the United States Torture Victim Protection Act and Alien Tort Claims Act which may help them combat torture, summary executions, false imprisonment, and disappearances in Turkey through the use of law.

32. I would like to continue writing articles about the Kurdish situation in Turkey and to write about developments in international law that may benefit the Kurds and the PKK. However, I am apprehensive and afraid to do so, lest such an act be construed as the criminal provision of "material support or resources" in the form of "personnel" or "training" to a designated foreign terrorist organization.

PROVISION OF LODGING TO THE KURDS

33. I and other Board and Advisory Board members of the HLP have provided lodging in the past and would like to provide lodging in the future to Kurds who are members of the ERNK, the Association of Lawyers from Kurdistan, the Legal Support Association ("AZADI"), the Kurdish Red Crescent, the Federation

of Kurdish Associations in Germany ("YEK-KOM"), Kurdisches Institut fur Wissenschafft und Forschung, Medico International, for members of the Kurdistan Parliament in Exile and members and supporters of the PKK and the ERNK in our homes and in rented lodgings in the United States and abroad. However, we are afraid to continue doing so, lest we face criminal prosecution under the AEDPA. The AEDPA broadly defines "material support or resources" to include the provision of "lodging."

SOME ADVERSE EFFECTS OF THE AEDPA

34. The AEDPA has had a chilling effect on my right and the right of the HLP, to freedom of speech and association under the United States Constitution. Despite many years of practice as an attorney and as an Administrative Judge, I find the definition of "material support or resources" in 18 U.S.C. Section 2339A(b) to be so vague that I am forced to speculate as to whether or not the activities I have described above could constitute crimes under the AEDPA. The definition fails to provide meaningful guidance as to the situations in which support and resources become "material." Moreover, the inclusion of the potentially far-reaching terms, "personnel" and "training" in the definition raises the possibility that the scope of activities constituting crimes under AEDPA could be extremely broad. Fear of criminal prosecution under the AEDPA has caused me and members of the HLP to experience tremendous anguish and anxiety in any continued political advocacy and prevision of material support for the human rights of the Kurds and the PKK. Specifically, the AEDPA has: inhibited our efforts to train Kurds and PKK members to promote their human rights interests; restricted

our freedom to associate with and provide lodging to Kurds and PKK members; caused us to refrain from soliciting funds for, or contributing funds to, the lawful activities of the PKK, and other Kurdish causes; and inhibited our efforts to publish articles describing how the Turkish government has denied the Kurds their human rights and describing developments in international law that could benefit the Kurds and the PKK.

35. Furthermore, upon learning that the PKK was designated as a foreign terrorist organization under the AEDPA, I felt compelled, as the President of HLP, to advise its Board and Advisory Board members to be constrained in their activity in behalf of the Kurds and the PKK. Yet, for the HLP to restrict its political advocacy in behalf of the Kurds and the PKK before the United Nations and the United States Congress, for it to limit any training of the Kurds and the PKK to promote their own political interests, for it to be inhibited in associating or offering lodging to the Kurds and PKK members, and for it to not solicit funds for, nor contribute funds to, the lawful activities of the PKK, to support Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, and to other Kurdish causes, offends the core purposes of the HLP and substantially interferes with its operation.

36. The PKK is a party to an armed conflict governed by the Geneva Conventions, the Hague Conventions and other treaty-based and customary international humanitarian law. This status is legally contradictory to a label as a terrorist organization. Sanctioning groups or individuals who align themselves with a party to a conflict is also contrary to the laws of armed conflict. Humanitarian aid to any party to a conflict or

to victims of armed conflict ought not to be subject to sanctions or prohibitions. The Geneva Conventions mandate that such aid is legal and may not be criminalized in any way by any party to the Geneva Conventions. Humanitarian aid includes legal services, advocacy and material resources that are provided to entities that comply with humanitarian law with respect to the rights of combatants and victims of war. Therefore, no part of my declaration is intended or should be inferred to suggest any acquiescence on my part or on the part of the HLP in that designation by the United States Secretary of State.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9th day of March, 1998, in Los Angeles, California.

/s/ RALPH DAVID HAYS FERTIG
RALPH DAVID HAYS FERTIG

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-1971 ABC (BQRx)

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

Dated: Apr. 21, 1998

DECLARATION OF KENNETH R. McKUNE

---

1. I, Kenneth R. McKune, am Associate Coordinator for Counterterrorism in the United States Department of State. In this capacity, I am responsible for the formulation, coordination and implementation of United States foreign policy regarding international terrorism. As the Associate Coordinator for Counterterrorism, I serve as a principal advisor to the Secretary of State, and report to her on substantive matters relating to the assessment of foreign terrorist threats and developments worldwide.

2. The Office of the Coordinator for Counterterrorism was established within the Office of the Secretary of State in 1985. In coordinating overseas counterterrorism policy and responding to international terrorist incidents, my office receives reporting and analysis from U.S. intelligence and law enforcement agencies, and from various foreign sources and embassies. The

information collected by the Department of State pertains to many different foreign terrorist organizations, including the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). Such data may be classified or unclassified, depending upon the method of collection, source, and content.

3. I make the following statement based upon information made available to me in the performance of my official duties, and upon ongoing consultations within the Department of State and with U.S. intelligence and law enforcement agencies. The following observations and conclusions regarding the PKK and LTTE, and the operation of terrorist groups more generally, have been prepared for use in a public proceeding and are therefore unclassified.

The PKK

4. Founded in 1974, the PKK is comprised primarily of Turkish Kurds. Its purpose was and is the establishment of an independent Kurdish state in southeastern Turkey.

5. Since its inception, the group has used violent, terrorist means in aid of its goals. The PKK's insurgency has claimed more than 22,000 lives since 1984. The group has attacked Turkish targets in Turkey, and elsewhere in Western Europe. In recent years, the PKK has moved beyond rural-based insurgent activities and embraced urban terrorism. Innocent U.S. civilians have suffered as a direct result of PKK terrorism. The following illustrative incidents are only a portion of the terrorist attacks perpetrated by the PKK.

a. The PKK claimed responsibility for the bombings of an oil pipeline in southeast Turkey on January 22, 1997 and March 10, 1997.

b. On October 29, 1996, a PKK suicide bomber detonated explosives outside a police station in Sivas, Turkey, killing herself, her accomplice, a bystander, and three policemen. Four other individuals, three of whom were civilians, were also injured. The PKK publicly claimed responsibility for this attack.

c. On October 25, 1996, a PKK suicide bomber detonated a bomb at a Turkish police station in Adana, Turkey, killing herself, three policemen, and a civilian bystander.

d. On September 23, 1996, PKK members hijacked a local bus in Turkey and kidnapped two passengers, one of whom was a U.S. citizen. They were released on September 27, 1996.

e. On June 30, 1996, a PKK suicide bomber detonated a bomb on her person in the middle of a group of soldiers in the town square of Tunceli, Turkey, killing herself and nine others, and wounding 35.

f. In May 1996, PKK leader Abdullah Ocalan publicly announced the PKK's intention to conduct terrorist attacks in areas of Turkey frequented by tourists.

g. On August 28, 1995, Turkish security personnel located and disarmed three PKK bombs at the Galleria Mall in Istanbul.

h. The PKK claimed responsibility for a series of four bombings in downtown Istanbul on August 27, 1995 which killed two people and wounded at least ten others, including a U.S. citizen.

i. In June 1994, the PKK claimed responsibility for a bomb attack on a ferry transiting the Bosporus Straits.

j. On November 4, 1993, five widely scattered properties in London, England with links to Turkey were firebombed in near-simultaneous attacks by the PKK.

k. On October 9, 1993, PKK members stopped a local bus in northeastern Turkey and kidnapped a U.S. tourist and a New Zealand tourist, holding them hostage until November 19, 1993.

l. In September 1992, the PKK claimed responsibility for an arson attack on the passenger ferry SARAYBURNU, while it was moored in Istanbul.

The LTTE

6. The LTTE was founded in 1976 to advocate the establishment of an independent Tamil state in Sri Lanka. As noted below, LTTE has used terrorist tactics, including bombings and political assassinations, to prosecute its campaign for independence. The following illustrative incidents are only a portion of the terrorist attacks perpetrated by the LTTE.

a. On March 5, 1998, an LTTE suicide bomber exploded a car bomb in Maradana, Sri Lanka, killing 37 people, and injuring more than 238 others.

b. On January 25, 1998, the LTTE exploded a truck bomb at the Buddhist Temple of Tooth in Kandy, killing 13 people and injuring 23 others.

c. On October 15, 1997, the LTTE detonated a truck bomb near the World Trade Center in central Colombo, injuring more than 100 people including 40 foreigners, among them seven U.S. citizens. Thirteen others were killed in ensuing gunfire between the LTTE terrorists responsible for the attack and security forces.

d. On September 9, 1997, the LTTE attacked a civilian ship north of the port of Trincomalee. Thirty-two people were killed in a subsequent gun battle between LTTE terrorists and security forces.

e. On July 17, 1997, the LTTE seized a cargo ship carrying food, killing one crew member.

f. On July 24, 1996, the LTTE exploded two bombs on a rush-hour commuter train, killing 57 people and injuring more than 250 others.

g. On July 7, 1996, an LTTE suicide bomber killed 21 people and wounded 50 others, including a Sri Lankan cabinet minister.

h. On January 31, 1996, the LTTE exploded a truck bomb filled with an estimated 1,000 pounds of explosives at the Central Bank in Colombo, killing 100 people and injuring more than 1,400. This bombing was the most deadly terrorist incident in the world in 1996.

i. On August 7, 1995, an LTTE suicide bomber exploded a bomb hidden in a coconut cart in Colombo, killing 24 and wounding 40 others.

j. On June 4, 1995, the LTTE exploded a bomb on a ship chartered by the International Committee of the Red Cross in Northern Jaffna.

k. On November 24, 1994, Sri Lankan opposition leader Gamini Dissanayake and 51 others were killed by an LTTE suicide bomber.

l. On April 8, 1994, the LTTE exploded bombs at three Colombo hotels, killing two people.

m. On May 1[,] 1993, an LTTE suicide bomber killed President Ranasinghe Premadasa and 23 others in Colombo.

n. On April 23, 1993, the LTTE assassinated former Sri Lankan Security Minister Lalith Athulathmudali at a rally in Colombo.

o. On September 1, 1992, the LTTE detonated a "bicycle bomb" in eastern Batticaloa, killing 22 civilians.

p. On July 8, 1991, LTTE forces killed 27 civilians in Batticaloa.

q. The LTTE used a car bomb to assassinate Sri Lankan Deputy Defence Minister Ranjan Wijeratne in Colombo on March 2, 1991.

r. On August 12, 1990, LTTE forces killed 120 civilians at Eravur.

s. On August 3, 1990, LTTE personnel used machetes, guns and grenades to kill 140 civilians praying at a mosque in the eastern Sri Lankan village of Kattankudy.

t. On April 13, 1989, an LTTE car bomb exploded in Trincomalee, killing 51 people.

u. On November 14, 1998, LTTE terrorists killed 27 Sinhalese in an attack on a bus in Trincomalee.

v. On June 2, 1987[,] LTTE terrorists stopped a passenger bus and shot 33 passengers, including 29 Buddhist monks near the eastern town of Arantalawa.

w. On April 21, 1987, an LTTE car bomb exploded at a Colombo, Sri Lanka bus terminal, killing 113 people.

Foreign Terrorist Organization Structure and Funding

7. In the interest of law enforcement and national security, and in furtherance of U.S. foreign relations, the Antiterrorism and Effective Death Penalty Act of 1996 prohibits the provision of material support or resources to foreign terrorist groups that have been formally designated, pursuant to statute, as "foreign terrorist organizations" by the Secretary of State. In prohibiting comprehensively the provision of such support and resources, the law does not differentiate between the criminal, terrorist activities of these organizations, and the civil, non-violent activities, if any, in which they might engage. In legislating this particular dimension of the "material support" ban, the Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."

8. The experience and analysis of the U.S. government agencies charged with combating terrorism strongly supports this congressional finding. Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.

9. This conclusion is based on a number of facts and circumstances. Many of the terrorist organizations designated by the Secretary derive a significant portion of their overall financing from fundraising conducted outside of their area of operations; in the case of the LTTE, for example, the group has historically raised a significant percentage of its funds—millions of dollars annually—in Europe and North America. Organizations such as the PKK and LTTE have established political or humanitarian components in addition to those components that carry out acts of terror. When foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put. But at the same time, the funds collected under the guise of political or humanitarian activities ultimately support the terrorist activities of these organizations.

10. This support comes in a variety of forms. Funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives. For example, Sri Lankan officials have publicly stated that funds raised by the LTTE in London have been used to acquire weapons and explosives. Leaders of LTTE fundraising efforts have publicly admitted that they are not so "naive" as to assume that funds collected by the LTTE will be used only for the "humanitarian" purposes advertised by the LTTE. In the case of other designated terrorist organizations, funds raised for purportedly legitimate purposes are used to support the establishment of logistical infrastructure (communications, housing and the like) and intelligence networks that are shared both by those group members involved in civilian activities and those involved in terrorist activities.

11. Terrorist organizations do not maintain *organizational* "firewalls" that would prevent or deter such sharing and commingling of support and benefits. To the contrary, in the case of many terrorist groups, there is contact and in some cases, coordination, between those individuals involved in terrorist activities, and those involved in ostensibly civil, political or humanitarian functions. Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.

12. Likewise, there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations. Terrorist groups operate in clandestine fashion to impede their apprehension by law enforcement authorities. Foreign terrorist organizations can and do take advantage of the fact that money is fungible and that there exist myriad ways to disguise its origin and transfer. It is uniquely in the interests of foreign terrorist organizations *not* to maintain accurate records, *not* to reveal sources of funding for arms, explosives and logistical infrastructure, *not* to admit that they derive criminal, terrorist benefit from ostensibly civilian, humanitarian activities, and indeed, *not* to admit to supporters who believe in the existence of "firewalls" that often these are no more than convenient rationalizations.

13. The PKK has itself not respected the line between humanitarian and violent activities. In January 1997, the United Nations High Commissioner for Refu-

gees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its "neutral and humanitarian nature." According to press reports, PKK members "systematically tried to convert [the camp] from a refugee camp into an operational base."

14. Even if funds or goods raised for charitable purposes are in fact so used in their entirety, the addition of such funds or goods to the coffers of terrorist groups such as PKK and LTTE unencumbers funds raised from other sources for use in facilitating violent, terrorist activities and gaining political support for these activities. Thus, humanitarian support, however well-intentioned, *increases* the resources that a terrorist organization can dedicate to unlawful, criminal ends. Individuals who wish to assist people in need may provide aid through the many legitimate organizations *not* affiliated with designated terrorist groups that have embraced terror, violence and attacks on innocent civilians.

15. The "cover" of charitable or political non-violent activities located within the organizational structure of a foreign terrorist organization provides effective concealment for the movement and preparations of criminal terrorists, and substantially undermines the investigatory efforts of law enforcement personnel in the United States and abroad, both by the United States and foreign governments. Because money is fungible and difficult to trace, and because terrorist groups do not open their books to the outside world, it is exceedingly difficult for U.S. law enforcement agencies to distinguish between funds used to support exclusively non-violent humanitarian activities, and those used to support crimi-

nal, terrorist activities. The means by which terrorist organizations transfer funds abroad are varied and obfuscatory: wire transfers; check cashing services; couriers carrying cash; and complex real estate transactions and bogus commercial transactions. Once funds are transferred to foreign institutions, the ability of the U.S. government to identify the end-recipients and beneficiaries of such funds is dramatically diminished.

16. In addition to national security and law enforcement interests, foreign policy imperatives also strongly support the prohibition on material support to designated terrorist organizations. A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations. Terrorist attacks on such governments threaten their social, economic and political stability, cause enormous human suffering, and endanger Americans visiting or residing overseas. In some cases, designated terrorist groups also threaten to undermine important foreign policy initiatives undertaken by the United States that have significance for U.S. vital interests beyond our bilateral relations with individual countries. For example, some designated terrorist groups engage in terrorist violence designed to undermine the Middle East peace process, which is of vital interest to the United States; other foreign terrorist organizations attack our NATO allies, thereby implicating important and sensitive multilateral security arrangements. It is a [*sic*] therefore a foreign policy priority of the United States to ensure that terrorist groups do not succeed in undermining such initiatives and arrangements, or in destabilizing foreign governments whose support and cooperation is vital to the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 21, 1998.

/s/ KENNETH R. MCKUNE
KENNETH R. MCKUNE

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED

NOV 16 2009

OFFICE OF THE CLERK

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.
HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL., CROSS-PETITIONERS
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPENING BRIEF FOR HUMANITARIAN LAW PROJECT, ET AL.

DAVID D. COLE
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078
Counsel of Record for
Respondents/Cross-Petitioners
Humanitarian Law Project et al.

TC+TA
567J56

(additional counsel on following page)

4173

SHAYANA KADIDAL
JULES LOBEL
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South
#14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow, Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN RUDRAKUMARAN
875 Ave. of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents in 08-1498
and Cross-Petitioners in 09-89,
Humanitarian Law Project et al.

QUESTION PRESENTED

Whether 18 U.S.C. § 2339B(a)(1)'s criminal prohibitions on the provision of "training," "expert advice or assistance," "service," and "personnel" to government-designated "terrorist organizations" are unconstitutional as applied to pure speech that promotes only lawful, nonviolent activities.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and appellees and cross-appellants in the court of appeals, and are respondents and cross-petitioners in this Court:[1] Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam. This brief refers to these parties as plaintiffs.

The following parties were defendants in the district court and appellants and cross-appellees in the court of appeals, and are petitioners and cross-respondents in this Court: the Attorney General of the United States, Eric Holder, Jr.; the United States Department of Justice; the United States Secretary of State, Hillary Rodham Clinton; and the United States Department of State. This brief refers to these parties as defendants.

---

[1] On November 2, 2009, this Court granted the parties' motion to amend the briefing schedule. This brief therefore addresses the questions presented in both the petition (08-1498) and conditional cross-petition (09-89) for writs of certiorari.

RULE 29.6 STATEMENT

Humanitarian Law Project, Ilankai Thamil Sangam, Tamils of Northern California, Tamil Welfare and Human Rights Committee, Federation of Tamil Sangams of North America, and World Tamil Coordinating Committee have no parent corporations and there are no publicly held corporations holding any of their stock.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

INTRODUCTION 2

STATEMENT 4

- A. The Statutory Scheme 4
- B. Plaintiffs' Intended Speech 10
- C. The Decisions Below 13

SUMMARY OF ARGUMENT 17

ARGUMENT 23

- I. PLAINTIFFS' INTENDED ACTIVITIES ARE PURE POLITICAL SPEECH ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION 23
- II. THE PROVISIONS ARE VAGUE AS APPLIED TO PLAINTIFFS' INTENDED SPEECH 25
  - A. Training 26
  - B. Expert Advice or Assistance 29
  - C. Service 34
  - D. Personnel 36

E. The Interaction of the Provisions Exacerbates Their Vagueness 38

F. The Government's Defense of the Challenged Provisions Fails to Account for the Fact that They Criminalize Pure Speech 40

G. The Provisions Are Overbroad Because Their Application to a Substantial Amount of Speech Is Unclear 42

III. THE CHALLENGED PROVISIONS IMPERMISSIBLY CRIMINALIZE PURE SPEECH AND DISCRIMINATE ON THE BASIS OF CONTENT 43

A. Strict Scrutiny Applies Because the Challenged Provisions Criminally Proscribe Pure Political Speech 45

B. Strict Scrutiny Applies Because the Provisions Discriminate on the Basis of Content 47

C. The Challenged Provisions Cannot Survive Strict Scrutiny 51

IV. THE CHALLENGED PROVISIONS VIOLATE THE RIGHT OF ASSOCIATION....56

V. *O'BRIEN* IS NOT APPLICABLE AND WOULD NOT SAVE THE CHALLENGED PROVISIONS AS APPLIED TO PLAINTIFFS' PROPOSED SPEECH...............59

A. *O'Brien* is Inapplicable 60

B. The Challenged Provisions Could Not Survive Even Intermediate Scrutiny 64

VI. THE COURT CAN AVOID THESE CONSTITUTIONAL PROBLEMS BY INTERPRETING THE STATUTE TO PROHIBIT ONLY SPEECH INTENDED TO FURTHER UNLAWFUL ENDS..................65

A. The Statute Should Be Interpreted to Require Proof of Intent to Further a Designated Organization's Illegal Ends 66

B. The Government's Proposed Statutory Construction Would Not Avoid the Constitutional Questions 69

CONCLUSION..71

TABLE OF AUTHORITIES

CASES

Aptheker v. Sec'y of State,
378 U.S. 500 (1964) 56, 64

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 48

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 53

Baggett v. Bullitt,
377 U.S. 360 (1964) 26

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 60-61

Bartnicki v. Vopper,
532 U.S. 514 (2001) 21, 45, 45, 52-53

Boos v. Barry,
485 U.S. 312 (1988) 46

Boumediene v. Bush,
128 S. Ct. 2229 (2008) 4

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 62-63, 69-70

Brandenburg v. Ohio,
395 U.S. 444 (1969) 54

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 43

California Teachers Ass'n v. State Bd. of Educ.,
271 F.3d 1141 (9th Cir. 2001) 41

City of Los Angeles v. Alameda Books,
535 U.S. 425 (2002) 45-46, 47

Coates v. Cincinnati,
402 U.S. 611 (1971) 30

Cohen v. California,
403 U.S. 15 (1971) 24, 45, 61

Connally v. General Constr. Co.,
269 U.S. 385 (1926) 25

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 24, 45, 61-62

De Jonge v. Oregon,
299 U.S. 353 (1937) 21, 46, 53-54, 57-58

Elrod v. Burns,
427 U.S. 347 (1976) 63

FCC v. League of Women Voters of California,
468 U.S. 364 (1984) 46, 47

Federal Election Comm'n v.
Wisconsin Right To Life, Inc.,
551 U.S. 449 (2007) 31

First National Bank v. Bellotti,
435 U.S. 765 (1978)..24, 49

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991)...................................18, 27, 29

*Gonzales v. O Centro Espiritu Beneficente
Uniao do Vegetal*, 546 U.S. 418 (2006)...................33

Grayned v. Rockford,
408 U.S. 104 (1972)...31

*Greater New Orleans Broadcasting Assn.,
Inc. v. United States*,
527 U.S. 173 (1999)... 48-49

Grutter v. Bollinger,
539 U.S. 306, 327 (2003)..33

Hamdi v. Rumsfeld,
542 U.S. 507 (2004)...4, 22

Hess v. Indiana,
414 U.S. 105 (1973)..53, 54

Hill v. Colorado,
530 U.S. 703 (2000)...50

Humanitarian Law Project v. Reno (HLP I),
205 F.3d 1130 (9th Cir. 2000)........................1, 35, 38

Humanitarian Law Project v. U.S. Dep't of Justice,
352 F.3d 382 (9th Cir. 2003),
vacated and remanded in light of
intervening legislation by
393 F.3d 902 (9th Cir. 2004) (en banc)......................1

Humanitarian Law Project v. Mukasey,
509 F.3d 1122 (9th Cir. 2007),
as amended, 552 F.3d 916
(9th Cir. 2009)........................1, 10, 13-17, 30, 36, 67

Humanitarian Law Project v. Reno,
9 F. Supp. 2d 1176 (C.D. Cal. 1998)..........................1

Humanitarian Law Project v. Reno,
9 F. Supp. 2d 1205 (C.D. Cal. 1998)..........................1

Humanitarian Law Project v. Ashcroft,
309 F. Supp. 2d 1185 (C.D. Cal. 2004).....................1

Humanitarian Law Project v. Gonzales,
380 F. Supp. 2d 1134
(C.D. Cal. 2005)........................... 1, 10-12, 14-17, 33

Jacobellis v. Ohio,
378 U.S. 184 (1964)..38

Jones v. United States,
526 U.S. 227 (1999)..66

Kent v. Dulles,
357 U.S. 116 (1958)..64

Keyishian v. Board of Regents,
385 U.S. 589 (1967)..57

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 41

Lamont v. Postmaster General,
381 U.S. 301 (1965) 47

McConnell v. FEC,
540 U.S. 93 (2003) 46

McIntyre v. Ohio Elections Comm'n.,
514 U.S. 334 (1995) 24, 51

Minneapolis Star & Tribune Co.
v. Minnesota Comm'r of Revenue,
460 U.S. 575 (1983) 49

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 59

NAACP v. Button,
371 U.S. 415 (1963) 18

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 54, 57, 58, 59

Noto v. United States,
367 U.S. 290 (1961) 57, 67

People's Mojahedin Org. of Iran v.
United States Dep't of State,
182 F.3d 17 (D.C. Cir. 1999),
cert. denied, 529 U.S. 1104-05 (2000) 5

Pierce v. Underwood,
487 U.S. 552 (1988) 41

Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 49

Raley v. Ohio,
360 U.S. 423 (1959) 39

RAV v. City of St. Paul,
505 U.S. 377 (1992) 23-24

Regan v. Wald,
468 U.S. 222 (1984) 63-64

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 26, 40

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 70

Sable Communications of Cal., Inc. v. FCC,
357 U.S. 449 (1958) 59

Scales v. United States,
367 U.S. 203 (1961) 22, 66, 67, 69

Simon & Schuster v. Members of the
New York State Crime Victims Board,
502 U.S. 105 (1991) 47, 50

Texas v. Johnson,
491 U.S. 397 (1989) 60, 62

Turner Broadcasting System Inc. v. FCC,
512 U.S. 622 (1994)....................50, 65

United States v. Cardiff,
344 U.S. 174 (1952)....................39

United States v. Handakas,
286 F.3d 92 (2d Cir. 2002)....................38

United States v. Hescorp, Heavy Equip. Sales Corp.,
801 F.2d 70 (2d Cir.),
cert. denied, 479 U.S. 1018 (1986)....................41

United States v. Homa Int'l Trading Corp.,
387 F.3d 144 (2d Cir. 2004)....................41

United States v. O'Brien,
391 U.S. 367 (1968)....................22, 59-60, 62, 64

United States v. Playboy Ent. Group, Inc.,
529 U.S. 803 (2000)....................20, 47

United States v. Robel,
389 U.S. 258 (1967)....................57

United States v. Sattar,
272 F. Supp. 2d 348 (S.D.N.Y. 2003).................... 37-38

United States v. Williams,
128 S. Ct. 1830 (2008)....................43

*Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.*,
455 U.S. 489 (1982).................... 25-26

Virginia v. Black,
538 U.S. 343 (2003) 23

Ward v. Rock Against Racism,
491 U.S. 781 (1999) 45, 65

Whitney v. California,
274 U.S. 357 (1927) 11, 46

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I 1

U.S. CONST. amend. V 2-3

STATUTES

8 U.S.C. § 1182(a)(3)(B)(iii)(V)-(VI) 5

8 U.S.C. § 1189 4

    8 U.S.C. § 1189(a) 5

    8 U.S.C. § 1189(d)(2) 5

18 U.S.C. § 2 55

18 U.S.C. § 371 55

18 U.S.C. § 1961-68 55

18 U.S.C. § 2339A 55

    18 U.S.C. § 2339A(b) 6, 48

18 U.S.C. § 2339A(b)(1) 6, 7, 9

18 U.S.C. § 2339A(b)(2) 8

18 U.S.C. § 2339A(b)(3) 9

18 U.S.C. § 2339B 2, 4, 45, 55, 67, 68

18 U.S.C. § 2339B(a) 6

18 U.S.C. § 2339B(a)(1) i

18 U.S.C. § 2339B(g)(4) 6

18 U.S.C. § 2339B(h) 9, 39, 71

18 U.S.C. § 2339B(i) 8, 39, 55, 66, 68

18 U.S.C. § 2339B(j) 7

18 U.S.C. § 2339B note 7, 52, 68

18 U.S.C. § 2339C 55

18 U.S.C. § 2385...67, 68, 69

28 U.S.C. § 1254(1) 1

50 U.S.C. § 781 (West 1991) (repealed 1993).........56

Anti-Terrorism and Effective Death Penalty Act
of 1996 (AEDPA), Pub. L. No. 104-132,
110 Stat. 1214 (April 24, 1996)................4, 7, 52, 68

Intelligence Reform and Terrorism
Prevention Act of 2004 (IRTPA),
Pub. L. No. 108-458, § 6603(b),
118 Stat. 3638, 3762 (2004) 4-5

USA PATRIOT Act of 2001,
Pub. L. No. 107-56, § 805(a)(2),
115 Stat. 272, 377 (2001) 4

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-383 (1995) 7, 52

142 Cong. Rec. S3354 (daily ed. April 16, 1996)
(statement of Sen. Hatch) 68-69

Statement by President George W. Bush
Upon Signing Intelligence Reform and
Terrorism Prevention Act of 2004,
40 Weekly Comp. Pres. Doc. 2985
(Dec. 17, 2004) 13

REGULATORY MATERIALS

Office of the Coordinator for Counterterrorism,
Department of State, Foreign Terrorist
Organizations (Jul. 7, 2009) 5, 6, 34

FEDERAL RULES OF EVIDENCE

FRE 403 33

FRE 702 33

TREATISES

Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 11

T. COOLEY, CONSTITUTIONAL LIMITATIONS (5th ed. 1883) 11

C. Sunstein, *Free Speech Now*, in THE BILL OF RIGHTS IN THE MODERN STATE (G. Stone, R. Epstein & C. Sunstein eds. 1992) 11

OTHER AUTHORITIES

Houghton Mifflin Reading Spelling and Vocabulary Word Lists 31

Webster's Third New International Dictionary (1993) 31-32

Mousa Abu Marzook, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at A15 34

Ahmed Yousef, *Engage With Hamas, We Earned Our Support*, Wash. Post, June 20, 2007, at A19 34

Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19 34

Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23) 34

OPENING BRIEF FOR HUMANITARIAN LAW PROJECT ET AL.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (Pet. App. 33a-76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1205, and 9 F. Supp. 2d 1176.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (Pet. App. 3a). Justice Kennedy extended the time for filing a petition for certiorari to June 4, 2009, and defendants filed a petition that day. Plaintiffs filed a conditional cross-petition for certiorari on July 6, 2009. The Court granted both petitions on September 30, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The Fifth Amendment provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law." Relevant statutory provisions are reprinted at Pet. App. 77a-81a and in a Statutory Appendix to this brief. App. 1a-4a.

INTRODUCTION

Plaintiffs – a retired judge, a medical doctor, a human rights organization, and several nonprofit groups – seek to engage in pure political speech promoting lawful, nonviolent activity. Specifically, they would like to resume what they were doing before the statutory prohibitions at issue here were triggered: teaching and advocating the use of international law and other nonviolent means to reduce conflict, advance human rights, and promote peace. Under defendants' interpretation of 18 U.S.C. § 2339B, however, if plaintiffs communicate such ideas to, for, or with direction from an organization that the government has labeled terrorist, they risk prosecution under that statute, which makes it a crime, punishable by fifteen years in prison, to provide "training," "expert advice or assistance," "service," or "personnel" to such groups. The government has stated unequivocally that these provisions make it a crime for plaintiffs to submit an amicus brief in federal court, to petition Congress or the United Nations for legal reform, or even to speak to the media, for the benefit of a designated organization, as well as to teach such an organization human rights advocacy or English. *See infra*, pp. 12-13, 27-28.

The statute at issue employs ill-defined or undefined terms to criminalize pure speech. It proscribes speech by express reference to its content. It is triggered by the Secretary of State's selective designation of "terrorist organizations," based on criteria that are in part explicitly political. And as interpreted by the government, it imposes criminal liability on speech and association without any showing that the speaker intended to incite or promote terrorist activity in any way. Indeed, on the government's reading, the statute makes speech a crime even if the speaker succeeds in *reducing* resort to violence by encouraging peaceful resolution of conflict.

It is undisputed that both of the organizations that plaintiffs seek to speak to, for, and in coordination with – the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) – engage in a wide range of lawful, nonviolent activity, and that plaintiffs seek to further only such activity.

Thus, this case asks whether the statutory provisions are constitutional as applied to pure speech that promotes peaceable, nonviolent activity. In that light, it is essential not to be misled by the statutory language of "material support" for "terrorist organizations." That language and the image it conjures have no relevance to plaintiffs' challenge. Plaintiffs' speech in favor of human rights and peace is not *material* support in any familiar sense of that term. Nor does it promote *terrorist* activity; indeed, its purpose is to discourage violence. Accurate identification of the actual legal questions, therefore, requires a focus on the particular provisions and specific speech at issue, rather than a general invocation of the misleading nomenclature of "material support" for a "terrorist organization."

Plaintiffs maintain that, as applied to their proposed speech, the challenged provisions are intolerably vague, discriminate on the basis of content, and penalize pure speech and association. The government has a compelling interest in combating terrorism, but as this Court has insisted, it must pursue that interest with respect for fundamental constitutional constraints. *See, e.g., Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004). This statute's sweeping criminalization of human rights advocacy and other speech fails that test.

STATEMENT

A. The Statutory Scheme

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, respectively, authorize the Secretary of State to designate "foreign terrorist organizations," and make it a crime to provide certain statutorily defined "material support" for even the nonviolent and humanitarian activities of such groups.[2]

---

[2] Congress amended the statute in the USA Patriot Act of 2001, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (2001), and again in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat.

Congress has authorized the Secretary to designate as "terrorist" any group (1) that is foreign; (2) that "engages in terrorist activity," defined to include virtually any unlawful actual or threatened use of a weapon against person or property; and (3) whose activities threaten "national security," expansively defined as the "national defense, foreign relations, or economic interests of the United States."[3] The Secretary's determination with respect to the third, expressly political "national security" criterion has been deemed a judicially unreviewable "political judgment[]." *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104-05 (2000). The Secretary is therefore free to designate as "terrorist" any foreign group that has used or threatened to use violence based on an unreviewable assessment of whether the group advances or impairs American foreign policy or economic interests. The authority has been employed selectively; many groups that use violence, including the Palestine Liberation Organization (PLO) and the Irish Republican Army (IRA), have never been designated "terrorist." *See* Office of the Coordinator for Counterterrorism, Department of State, Foreign

---

3638, 3762-64 (2004).

[3] 8 U.S.C. § 1189(a) (criteria for designation); 8 U.S.C. § 1182(a)(3)(B)(iii)(V)-(VI) (defining "terrorist activity" to include, among other things, any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain); 8 U.S.C. § 1189(d)(2) (definition of "national security"). These statutes are reproduced in an Appendix to this brief. App. 1a-4a.

Terrorist Organizations (Jul. 7, 2009), www.state.gov/s/ct/rls/other/des/123085.htm.

Once the Secretary designates a group, it becomes a crime to "knowingly provide[] material support or resources" to the group. 18 U.S.C. § 2339B(a). Incorporating the definition set out in 18 U.S.C. § 2339A(b), the statute defines "material support or resources" as:

> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1) (emphasis added), incorporated by 18 U.S.C. § 2339B(g)(4).

The government interprets this statute to permit punishment without any proof that an individual intended, knew, or even should have known that his speech would be used for any terrorist, violent, or illicit purpose. It is enough that he knew that the group he spoke to or for the benefit of was designated or had engaged in terrorist activities. It is no defense that his speech was designed, as plaintiffs' speech is here, to *discourage* violence and to encourage lawful alternatives.

When Congress enacted the material-support statute in 1996, it declared that any "*contribution to*" a foreign organization that engages in terrorist activity "facilitates that conduct." AEDPA, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996), 18 U.S.C. § 2339B note (emphasis added). At the same time, however, the statute expressly permits unlimited donations of medicine and religious materials, 18 U.S.C. § 2339A(b)(1), and provision of such other forms of support as the Secretary finds "may [not] be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

A key House Report in the legislative process states that the statute was not intended to reach protected speech and association. The Report recognizes that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," and insists that "[t]he basic protection of free association afforded individuals under the First Amendment remains in place" because the statute does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization." H.R. Rep. No. 104-383, at 43, 44 (1995). Quoting the Report, the government argued below, after the 2001 and 2004 amendments, that the Report still reflected Congress's intent and even added: "Congress noted that the statutory ban 'only affects one's contribution of financial or material resources.'"[4] Despite these intentions, however, Congress defined "material support" in ways that criminalize pure speech, as this case demonstrates.

---

[4] First Cross-Appeal Br. for Appellants at 5-6 (CA9 filed Apr. 4, 2006) (quoting H.R. Rep. 104-383, at 44), quoted at Plaintiffs' Br. in Opp. 4-5.

In 2004, after the courts in this case had declared the prohibitions on "personnel," "training," and "expert advice or assistance" impermissibly vague, Congress added to the statute an express recognition that application or construction of the statute might infringe First Amendment interests, and specifically disclaimed any intent to do so:

> (i) **Rule of construction.** – Nothing in this section shall be *construed or applied* so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

18 U.S.C. § 2339B(i) (emphasis added). At the same time, however, Congress added a new, undefined prohibition on the provision of "service." And Congress added definitions for the previously invalidated provisions that continue to criminalize pure speech and association, discriminate on the basis of content, and leave their scope fundamentally ambiguous.

Four prohibitions in the current version of the statute are at issue here. First, the statute prohibits the provision of "training," which Congress defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2).

Second, the statute outlaws the provision of "expert advice or assistance," which is defined as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3).

Third, the statute prohibits the provision of "service" but leaves this term undefined. 18 U.S.C. § 2339A(b)(1). The government maintains that "service" broadly encompasses any "act done for the benefit of" a designated group. Pet. 17.

Fourth, the statute bars the provision of "personnel," 18 U.S.C. § 2339A(b)(1), which includes any person, including oneself, who works under an organization's "direction or control," but excludes persons acting "entirely independently" of the group:

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h).

B. Plaintiffs' Intended Speech

Plaintiffs include the Humanitarian Law Project (HLP), a longstanding human rights organization with consultative status to the United Nations; Ralph Fertig, a retired United States administrative law judge who has served as the HLP's President; Nagalingam Jeyalingam, an American physician; and several domestic nonprofit groups that focus on the interests of persons of Tamil descent. Prior to AEDPA's enactment, the HLP and Judge Fertig had been assisting the PKK by training them in how to bring human rights complaints to the United Nations, advocating on their behalf, and assisting them in peace negotiations. Fertig Dec. ¶¶ 10-18, 24-26, 30-32 (March 9, 1998); J.A. 113-23 (describing HLP conduct prior to designation of PKK). They halted such activities once the Secretary, in 1997, designated the PKK a "foreign terrorist organization."

As the district court found, the HLP and Judge Fertig seek to

> provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.

Pet App. 35a; *id. at* 5a n.1. As Judge Fertig explained, he and the HLP would like, among other things, to "offer [their] services to advocate on behalf of the rights of the Kurdish people and the PKK before the United Nations and the United States Congress." Fertig Dec. ¶ 16 (Mar. 9, 1998), J.A. 116; *see also* Fertig Dec. ¶ 19 (May 11, 2005), J.A. 98 (same). They filed this lawsuit to seek injunctive and declaratory relief that, *inter alia*, would allow them to do so without being prosecuted for providing "material support" to a designated group.

Dr. Jeyalingam and the Tamil organizations similarly seek to speak in support of the humanitarian and political activities of the LTTE, which the Secretary of State, in 1997, also designated a "foreign terrorist organization." As the district court found, the Tamil plaintiffs

> seek to provide training in the presentation of claims to mediators and international bodies for tsunami-related aid, offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and engage in political advocacy on behalf of Tamils living in Sri Lanka.

Pet. App. 35a-36a; *id.* at 5a n.1.[5]

In this case, as resolved on summary judgment, the following facts are undisputed: (1) both the PKK and LTTE engage in a broad range of lawful activities, including the provision of social services, political advocacy, and economic development, Pet. App. 34a-36a; (2) the PKK is the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations, *id.* at 34a-35a; (3) the LTTE is the principal political organization representing the Tamils in Sri Lanka, another ethnic minority that has been subjected to human rights abuse and discrimination, *id.* at 35a; and (4) plaintiffs intend to speak only in furtherance of *lawful and nonviolent* activities of these groups. *Id.* at 34a-36a (describing intended support).[6]

---

[5] As the petition notes, the LTTE was recently defeated militarily in Sri Lanka. Pet. 5 n.1. Much of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot. However, the LTTE continues to exist as a political organization outside Sri Lanka advocating for the rights of Tamils, and plaintiffs continue to seek to support its lawful, nonviolent activities through the speech identified by the district court.

The government has made clear that it considers plaintiffs' intended activities criminally proscribed by the challenged statutory terms. At oral argument before the court of appeals, counsel for the government maintained that if plaintiffs filed an amicus brief for the LTTE in this lawsuit, advocated on the group's behalf before the United Nations, asked Congress to grant the LTTE an exemption from the statute, or provided advice on how to mediate disputes, they would be engaged in criminal activity under the statute.[7]

---

[6] The government in its petition asserted that both the LTTE and the PKK engaged in terrorist activities, but plaintiffs both disputed the government's evidence and argued that these facts were immaterial. Pl. Statement of Genuine Issues in Response to Def. Mot. for Summ. Jdgmt. (July 18, 2005). Neither the district court nor the court of appeals made any finding regarding terrorist activities of either group.

[7] The tape of the oral argument is available at: http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004505. The remarks quoted above occur at 33:15, 34:30,

For example, the court asked government counsel: "If you have an attorney in the U.S. who wishes to counsel one of these organizations on how to argue their case, or how to bring their case, before the United Nations, is that a crime?" Counsel for the government replied: "Yes, your honor. We do not want U.S. persons to be assisting terrorist organizations in making presentations to the U.N., to television, to a newspaper, we do not want U.S. persons assisting these organizations except as Congress specifically has provided."[8]

C. The Decisions Below

Plaintiffs filed this action in 1998, challenging the statute on First and Fifth Amendment grounds. They asserted, among other things, that the statute's prohibitions on providing "training" and "personnel" were unconstitutionally vague. (Neither term was defined in the original 1996 statute.) The district court granted plaintiffs a preliminary and then a permanent injunction barring enforcement of those two provisions against plaintiffs' proposed activities, finding them unconstitutionally vague. *See* Pet. App. 6a-7a. It rejected plaintiffs' other challenges, including their contention that the statute infringed their right of association. *Id.* The court of appeals unanimously affirmed the preliminary injunction in

---

36:00, and 41:02.

[8] *Id.* at 39:20.

2000 and the permanent injunction in 2003. *Id.* at 7a, 8a.[9]

Meanwhile, Congress amended the statute in 2001 to add another undefined prohibition on speech, barring the provision of "expert advice or assistance." Plaintiffs filed a second challenge, and in March 2004, the district court held that this provision, too, is unconstitutionally vague. *See id.* at 8a.

In September 2004, in the first case, the court of appeals granted rehearing en banc (on requests from both parties). *Id.* at 9a. While en banc review was pending, Congress in 2004 amended the statute again, providing definitions for "training," "personnel," and "expert advice or assistance," and adding a new, and undefined, prohibition on the provision of "service." *Id.* at 9a-10a. The en banc court of appeals remanded for consideration of the effect of those statutory amendments. *Id.* at 11a.

On remand, the district court held that Congress's new definition of "personnel" cured the vagueness of that provision, but that the new definition of "training" and part of the new definition of "expert advice or assistance" (concerning "specialized knowledge") were unconstitutionally vague as applied to plaintiffs' proposed speech. *Id.* at 62a-66a, 68a-69a. It also held that the new prohibition on "service" was unconstitutionally vague as applied to plaintiffs' speech. *Id.* at 66a-68a. The district court rejected plaintiffs' remaining contentions. *Id.* at 46a-60a, 69a-74a.

---

[9] *Humanitarian Law Project v. Reno (HLP I)*, 205 F.3d 1130, 1137-38 (9th Cir. 2000); *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003), *vacated and remanded in light of intervening legislation*, 393 F.3d 902 (9th Cir. 2004) (en banc).

Both parties appealed, and the court of appeals once again unanimously affirmed. It reasoned that the constitutional "requirement for clarity is enhanced" where, as here, a criminal statute touches on "sensitive areas of basic First Amendment freedoms." *Id.* at 20a (internal quotations omitted). It emphasized that it was addressing the provisions' vagueness only as applied to plaintiffs' intended speech. *Id.* at 2a, 22a n.6, 5a n.1 (describing plaintiffs' proposed speech).

With respect to "training," the court found it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami-related aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. Stressing that the term as defined "could still be read to encompass speech and advocacy protected by the First Amendment," *id.* at 22a, the court held that

> the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."

Id. at 22a-23a (quoting *id.* at 64a).

The court noted that the prohibition on "expert advice or assistance" similarly encompasses protected speech or advocacy. *Id.* at 24a. It held that the prohibition on advice or assistance "derived from ... other specialized knowledge" was impermissibly vague, *id.* at 23a-24a, but it upheld the prohibition on advice or assistance "derived from scientific [or] technical ... knowledge." *Id.* at 24a. The court offered no reasoning for upholding this aspect of the statute, and merely cited school reading lists that identified "technical" as a fifth-grade vocabulary word and "scientific method" as a third-grade vocabulary word. *Id.*

The court also deemed vague, as applied, the prohibition on "service," which Congress left undefined, but which defendants have stated applies to anything done "for the benefit of" a designated group. *Id.* at 25a (adopting district court's holding and reasoning at *id.* at 66a-68a).

The court of appeals agreed with the district court that the amended definition of "personnel" cured that term's prior vagueness. *Id.* at 26a-27a. The court rejected plaintiffs' other claims, including the contention that the statute imposed guilt by association in violation of the First and Fifth Amendments, and that the statute should be narrowly construed to apply only to speech intended to further an organization's illegal activities. *Id.* at 13a-19a; *id.* at 27a-32a.[10]

---

[10] Plaintiffs initially sought to provide a broader range of humanitarian assistance to the PKK and the LTTE, but plaintiffs at this stage pursue only their challenge to the provisions as applied to speech promoting lawful, nonviolent

SUMMARY OF ARGUMENT

This case presents a narrow, but critically important, question: does Section 2339B comport with the Constitution insofar as it criminalizes pure speech promoting lawful, nonviolent activities – here, core political speech, including human rights advocacy and peacemaking? Plaintiffs argue that as applied to such speech, the statutory prohibitions on providing "training," "expert advice or assistance," "service," and "personnel" are unconstitutional because they are vague, penalize protected speech and association, and impermissibly discriminate on the basis of content.

The narrow focus of plaintiffs' claims in this Court means that the case does *not* involve the propriety of banning financial or other tangible support to terrorist organizations. Nor does it involve speech advocating or teaching *criminal* or *violent* activity. Plaintiffs here seek only to safeguard their right to promote lawful, nonviolent activities through pure speech.

I. The fact that plaintiffs seek to engage in pure speech, of a political character, advocating only lawful, nonviolent activities, colors all of the constitutional analysis here. The right to engage in peaceable political speech is at the very core of the First Amendment, and government attempts to

---

activities, as described by the district court and court of appeals. Pet. App. 5a n.1; *id.* at 35a-36a. Plaintiffs read the injunction affirmed by the court of appeals as limited to protecting only that speech.

criminalize such speech warrant the Court's most skeptical scrutiny.

II. The challenged provisions are unconstitutionally vague. Criminal prohibitions affecting speech demand "precision of regulation." *NAACP v. Button*, 371 U.S. 415, 438 (1963). These provisions are the antithesis of precise. The prohibition on "training," for example, requires plaintiffs to distinguish between "specific skills" and "general knowledge," "classic terms of degree" strikingly similar to those this Court has previously declared unconstitutionally vague. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). To decide whether their speech is proscribed as "expert advice," they must discern whether it is "derived from" general knowledge or instead from "scientific, technical, or other specialized knowledge" – a distinction likewise far too uncertain and context-dependent to support criminal sanctions.

To decide whether an appeal to Congress or the United Nations is a prohibited "service," plaintiffs must distinguish between speaking "on behalf of an organization," which the government claims is permissible, and speaking "for the benefit of" the organization, which the government contends is a crime. And to avoid punishment for the provision of "personnel," plaintiffs must guess what level of coordination or association with a designated group denies them protection for "entirely independent" activity and triggers the prohibition on acting at an organization's "direction."

Each of these inquiries, moreover, is further complicated by the fact that the provisions overlap in internally contradictory ways. The "training" and "expert advice" definitions appear to permit teaching or advice based solely on "general knowledge," but such teaching or advice would violate the "service" prohibition if done for the group's benefit. The "personnel" prohibition carves out "entirely independent" activities, but neither teaching nor advice could be "entirely independent" by their nature. Even independent activities would be a prohibited "service" if done for the organization's benefit. Muddying the waters still further, the government claims that there is an unwritten exemption for "independent advocacy" that applies across the whole statute, but would not allow "any collaboration or other relationship between the giver and the recipient." Pet. 22.

The courts below correctly deemed the prohibitions on "training," "service," and "expert advice or assistance" "derived from specialized knowledge" impermissibly vague as applied, because they fail to afford plaintiffs any clear guidance as to what speech is criminally prohibited. The same conclusion, however, also holds for the prohibitions on "personnel" and "expert advice or assistance" "derived from scientific [or] technical ... knowledge." All four provisions are therefore impermissibly vague as applied to plaintiffs' speech. Indeed, the provisions are so vague that they render the statute facially overbroad, for they appear to penalize not just plaintiffs' speech, but virtually all speech promoting lawful activity when communicated to, for, or at the direction of a designated group.

III. Wholly apart from their vagueness, the challenged provisions are unconstitutional as applied because they flatly prohibit pure speech promoting lawful, nonviolent ends, and because they discriminate on the basis of content. The statute's terms draw facially content-based distinctions between "specific skills" and "general knowledge"; between "scientific, technical, or other specialized knowledge," and all other knowledge; between "religious" and nonreligious materials. As the government defines "service," that term discriminates on the basis of viewpoint. It prohibits speech "for the benefit of" a designated group, but permits speech critical of the group. And the statute's penalties expressly turn on whether speech is associated with a favored or disfavored political organization. The identical speech on human rights is permissible if communicated to, for the benefit of, or at the direction of, the PLO, which has never been designated, but proscribed if made to, for, or at the direction of the PKK.

The challenged provisions cannot survive strict scrutiny. Prohibitions of pure speech are presumptively invalid. And "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). While national security is a compelling interest, the government has not shown that it is necessary to prohibit speech promoting peaceable, nonviolent activity to serve that end. Indeed, this Court has repeatedly ruled that otherwise lawful expression and association may not be criminalized in order to forestall others from engaging in illegal conduct. *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

IV. The challenged provisions also violate plaintiffs' right of association. All four provisions do so, as noted above, by penalizing speech only when it is communicated to, for the benefit of, or at the direction of selectively disfavored organizations. And the "service" and "personnel" provisions directly penalize association wholly apart from their discriminatory application. Virtually any action one might take in conjunction with a designated organization could be viewed as done for its "benefit," and therefore a prohibited "service." And if, as the government maintains, acting in collaboration with a group forfeits any protection for "independent advocacy," the statute directly penalizes association. Congress may not criminally punish association, however, absent proof of specific intent to further an organization's illegal ends. As interpreted by the government, the statute contains no such requirement, and is therefore invalid.

V. The provisions cannot be upheld under the intermediate scrutiny standard established in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *O'Brien* applies only to *content-neutral* regulations of expressive *conduct*. It is categorically inapplicable to statutes that penalize pure speech or association, or discriminate based on content. In any event, the provisions would not survive intermediate scrutiny, as they prohibit vastly more speech than is necessary to serve any legitimate interest in national security.

VI. Finally, the Court can avoid all of the foregoing constitutional questions by interpreting the statute to require proof of intent to further an organization's illegal ends where, as here, pure speech and association are at stake. Congress specified that the statute should not be "construed or applied" to violate the First Amendment. Interpreting the statute to require specific intent where it is applied to pure speech and association would fully support, on statutory grounds, the injunctive and declaratory relief plaintiffs seek, and thereby permit the Court to avoid the constitutional questions raised here.

This is the same route the Court followed in *Scales v. United States*, 367 U.S. 203 (1961), when it faced another statute that on its face appeared to impose wide-ranging penalties on speech and association because of the illegal ends of a "terrorist organization." The government's alternative construction, which would exempt only "independent advocacy," would not avoid the constitutional questions presented here. The First Amendment protects more than the abstract right to speak "independently," but also the right, asserted here, to speak to others, in association with others, and at the direction of others.

This Court has warned that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi,* 542 U.S. at 536 (plurality). This principle applies to Congress, too, and has particular importance for the statute at issue here, which is not limited to times of emergency or war, or to groups that have attacked the United States or Americans. Where, as here, Congress has expressly directed that its law is not to be applied in ways that violate the First Amendment, where no financial or tangible support is at issue, and where the government has not shown that criminalizing purely peaceable expression is necessary to the nation's security, plaintiffs' proposed speech must be protected.

ARGUMENT

I. PLAINTIFFS' INTENDED ACTIVITIES ARE PURE POLITICAL SPEECH ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION

Plaintiffs propose to engage in pure speech addressing political issues, which this Court has long held is entitled to the First Amendment's highest protection. The political character of plaintiffs' speech is clear: they seek to lobby Congress, to teach and advise on human rights, to promote the peaceful resolution of political disputes, and to advocate for the human rights of minority populations represented by the designated organizations. Pet. App. 5a n.1; Fertig Declarations, J.A. 91-126. Congress's criminalization of such speech as applied here warrants application of the First Amendment's most stringent safeguards.

"[L]awful political speech [is] at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). "Core political speech occupies the highest, most protected position" constitutionally accorded to speech. *RAV v.*

City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *First National Bank v. Bellotti,* 435 U.S. 765, 776 (1978) (political speech "is at the heart of the First Amendment's protections").[11] Because political speech warrants such heightened protection, this Court has stated that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 347 (1995) (citation omitted).

Here, plaintiffs' proposed activities are not only political but constitute pure speech. They do not seek protection for conduct engaged in for expressive purposes, but for speech itself. The Court has insisted that pure speech warrants the highest protection, and has refused to apply relaxed scrutiny to criminal bans on pure expression. *See, e.g., Cohen v. California,* 403 U.S. 15, 18 (1971) (treating conviction for wearing jacket with offensive message as based on pure speech, and subjecting it to heightened scrutiny); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 495 (1975) (same for conviction based on "pure expression" under Georgia rape shield law). *See infra,* Point V.A.

In considering each of plaintiffs' legal challenges, therefore, the fact that the statute as applied here criminalizes pure political speech must trigger the Court's most skeptical review.

---

[11] *See also Whitney v. California,* 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); T. COOLEY, CONSTITUTIONAL LIMITATIONS *421-22 (5th ed. 1883); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); Sunstein, *Free Speech Now,* in THE BILL OF RIGHTS IN THE MODERN STATE 304-07 (G. Stone, R. Epstein & C. Sunstein eds. 1992).

II. THE PROVISIONS ARE VAGUE AS APPLIED TO PLAINTIFFS' INTENDED SPEECH

Congress defined "material support" to reach well beyond mere financial support and the provision of tangible goods. By their terms, and as the government has interpreted them, the criminal prohibitions implicate a broad range of pure speech: "training" in any "specific skill"; "expert advice"; speaking, writing, or petitioning Congress or the United Nations "for the benefit of" a designated group; and coordinating one's speech with a group in such a way as to act under its "direction or control." These prohibitions fail to offer plaintiffs sufficiently clear guidance as to whether and to what extent their proposed speech is in fact prohibited.

A statute is vague if it causes "men of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The degree of precision required increases with the gravity of the penalty and the importance of the rights at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (higher standard applicable for criminal statutes and when speech at stake). Under well-settled law, the material-support provisions at issue here are subject to the most stringent vagueness scrutiny for two reasons: they impose severe criminal sanctions, and they trench on speech and associational rights. *Id.*; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Baggett v. Bullitt*, 377 U.S. 360, 372-73 (1964).[12] All four provisions require ordinary persons to guess at their meaning. They fail to draw the clear lines mandated by the Constitution where speech may trigger criminal sanctions.

A. Training

The prohibition on "training" requires individuals to draw impossible distinctions between prohibited instruction in a "specific skill" and permissible instruction in "general knowledge." To determine whether their proposed teaching of human rights advocacy or peacemaking is proscribed, for example, plaintiffs must guess at whether they would be imparting "specific skills" or merely "general knowledge." If they guess wrong, they face up to fifteen years in prison.

---

[12] In its petition, the government maintained that "the material-support statute does not regulate speech," and therefore does not warrant heightened vagueness scrutiny. Pet. 13. That is simply false. As demonstrated above, all of plaintiffs' proposed activities are pure speech. *See supra*, Point I. When a statute prohibits "training," defined as "*instruction or teaching*," "expert *advice*," and any advocacy done "for the benefit" of a designated group or under its "direction or control," it directly criminalizes speech. The government conceded as much in the lower courts, where it admitted that the statutory provisions would criminalize, among other things, the teaching of political geography or English, lobbying the United Nations and Congress, writing amicus briefs, and advocating for a designated group's benefit on television or in the print press. *See supra*, pp. 12-13; *infra*, p. 27-28.

The difficulty is that "general knowledge" and "specific skills," much like "general" and "elaborated," are "classic terms of degree," and as such, provide "no principle for determining when ... remarks pass from the safe harbor of the general to the forbidden sea of the [specific]." *Gentile v. State Bar of Nevada*, 501 U.S. at 1048-49 (holding unconstitutionally vague a state bar rule that allowed lawyers to make "general" remarks on pending criminal cases, but barred them from "elaborating").

The government's own attempts to explain the distinction suffice to establish its inescapable vagueness. Before the court of appeals, counsel for the government opined that, under this definition, teaching geography would be permissible because it constitutes "general knowledge," but teaching the political geography of terrorist organizations would constitute a banned "specific skill," as would the teaching of English.[13] But what if, during a "general" course on geography, a student's question prompted a discussion of the political geography of terrorist organizations? What if the course included a session on the science of geography, or the geography of a specific region incorporating statistical information? An ordinary person could only hazard a guess as to whether these are impermissible "specific skills," or permissible aspects of "general knowledge."

---

[13] The colloquy took place during the en banc oral argument, at approximately 49 minutes into the argument. *See* Recording of En Banc Oral Argument, Dec. 14, 2004, available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506. At the time of oral argument, Congress had passed the 2004 amendments, but President Bush had not yet signed them into law. *See* Statement by President George W. Bush Upon Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 Weekly Comp. Pres. Doc. 2985 (Dec. 17, 2004). Government counsel nonetheless addressed the new law's definitions in the colloquy above.

In the district court, government counsel similarly illustrated the profound difficulty of understanding the "training" prohibition. Defendants asserted in their brief that plaintiffs were free to advocate "on behalf of" the PKK before the United Nations or "any forum of their choosing," even though they simultaneously asserted that any activity done "for the benefit of" a designated group would be a proscribed "service." Govt. Mem. in Supp. of S.J. at 17 n.8, 21 (July 17, 2005). When the district court at oral argument asked whether plaintiffs could lobby the U.N. on the PKK's behalf, government counsel first said that they could do so. D. Ct. Tr. 7-8, C.A. Supplemental Excerpts of Record (SER) 218-19. When the court asked whether plaintiffs could meet with members of the PKK to discuss a strategy for lobbying the U.N., and then divide up into groups to carry it out, however, counsel opined that such conduct "presumably could" constitute prohibited "training," D. Ct. Tr. 11, C.A. SER 220, and minutes later stated that it "clearly comes within the proscriptions against training and expert advice or assistance." D. Ct. Tr. 15; C.A. SER 224. At the close of the colloquy, the district court concluded, "I don't know how you think anyone, a normal person, would figure this out based on this exchange." D. Ct. Tr. 19, C.A. SER 228.

B. Expert Advice or Assistance

The ban on providing "expert advice or assistance" is vague for many of the same reasons. It, too, directly criminalizes speech, and forces plaintiffs to guess whether any aspect of their advice could be said to "derive[] from scientific, technical, or other specialized knowledge." The vagueness infects the entire prohibition, not just the "specialized knowledge" component.

Notably, the statute requires individuals to determine, not simply whether their speech is itself "technical," "scientific," or "specialized," but, even more ambiguously, whether its content in any way "*derives from*" scientific, technical, or other specialized knowledge. Virtually all knowledge might be thought to *derive from* scientific, technical, or some other specialized knowledge, yet Congress plainly intended some limit. The statute provides no coherent or reliable way to make the distinction.

The courts below correctly invalidated the "specialized knowledge" portion. Like "general" and "elaboration," "specialized" is a "classic term of degree," and fails to afford notice of what is prohibited. *Gentile*, 501 U.S. at 1048-49. Judge Fertig could not risk providing advice about presenting human rights claims to the United Nations unless he was certain that his advice was derived from "general knowledge" and included no statement informed by "specialized knowledge." But how does one distinguish which aspects of human rights derive from general as opposed to specialized knowledge? And because providing advice generally involves a conversation, how can one know whether one's responses to questions might stray into a subject that could be said to be "derived from ... specialized knowledge" (or, for that matter, "scientific [or] technical" knowledge)? A large share (perhaps most) of general knowledge consists of "specialized knowledge" that has come to be widely known, so is literally "derived from" specialized knowledge. How are plaintiffs to tell the difference?

Having correctly deemed the ban on advice "derived from ... specialized knowledge" to be unconstitutionally vague as applied to plaintiffs' speech, the courts below erroneously upheld the ban on advice "derived from scientific [or] technical ... knowledge." No sound rationale supports the latter conclusion. Indeed, the court of appeals proffered no rationale, but merely cited two sources indicating that "technical" and "scientific method" are fifth-grade and third-grade level vocabulary words, respectively. Pet. App. 24a.

This misconceives the duty of a court in assessing a vagueness challenge. The question is not whether the terms are widely known, but whether they provide sufficient notice of what is prohibited in the context of a criminal law trenching on First Amendment rights. Many words on grammar school vocabulary lists would not pass that test, or even more lenient tests of vagueness. *See Coates v. Cincinnati*, 402 U.S. 611 (1971) (declaring vague a city ordinance banning "annoying" behavior). "Monstrous," "tremendous," "awesome," "incredible," "intense," and "dreadful" are all on a third-grade vocabulary list, but would hardly be permissible terms to specify prohibited activity in a criminal statute.[14] Indeed, the word "specializes," which the court rightly deemed vague (in the form, "specialized"), is on one of the fourth grade lists from the same source the court cited.[15]

The "expert advice" prohibition leaves citizens without meaningful guidance, and gives prosecutors and juries broad discretion to target unpopular speech. *See Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). In one common usage, what knowledge is "technical" or "specialized" will depend entirely on what one's assumed audience already knows or remembers or how much effort will be required to take it in. High school algebra, for example, might be "technical" or "specialized" for one audience, but "general knowledge" for another. So, too, speech addressing human rights, lobbying, or public relations could be deemed to involve "general knowledge" or instead to derive from "technical" and "specialized" knowledge, depending on the sophistication of the audience. Speech that might or might not be proscribed based on its potential effect on a listener is clearly vague, for the speaker has no way of gauging listeners' reactions. *See Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 494-95 (2007).

Webster's Third New International Dictionary (1993) defines "technical" to mean, *inter alia*: (1) "having special us[ually] practical knowledge especially of a mechanical or scientific subject," (2) "marked by or characteristic of specialization," (3) "of or relating to a particular subject," and (4) "of or relating to technique." *Id.* at 2348. It defines "specialized" to mean, *inter alia*, "designed or fitted for use or employment in one special line (as of occupation)." *Id.* at 2186. Virtually all advice could be said to "derive" from knowledge relating to a "particular subject," "technique," "line," or "occupation." Congress meant to excise *something* when it carved out advice derived from non-specialized knowledge, but the language it employed offers little guidance.

---

[14] Houghton Mifflin Reading Spelling and Vocabulary Word Lists, www-kes.stjohns.k12.fl.us/wordlists/3rd/vocab3.htm.

[15] *Id.*, www-kes.stjohns.k12.fl.us/wordlists/4th/vocab5.htm.

"Scientific" also leaves vast room for uncertainty. The term means "of, relating to, or used in science." *Id.* at 2032. "Science," in turn, means, *inter alia*: (1) "possession of knowledge as distinguished from ignorance or misunderstanding," (2) "a branch or department of systematized knowledge that is or can be made a specific object of study;" or (3) "knowledge classified and made available in work, life, or the search for truth." *Id.* Debates rage about when, or the extent to which, disciplines have become "scientific" (economics? psychology? geography? political science?). Would advice on presenting torture claims to a human rights tribunal be barred because assessing whether someone has been the victim of torture may in part derive from "scientific" or "technical" knowledge? Would advice for peace negotiations that addressed such issues as allocation of natural resources, energy use, transportation, or voting and representational arrangements be barred as derived from scientific or technical knowledge?

The government has defended the statutory definition by noting its similarity to the definition of "expert testimony" under Rule 702 of the Federal Rules of Evidence. Pet. 15. But here, as elsewhere in the law, "context matters." *Gonzales v. O Centro Espiritu Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). That a particular standard may suffice as a guide to discretionary judgment calls made by trained judges (who do not risk going to jail for a mistake) does not mean that it can be imposed on the general public on pain of fifteen years' imprisonment. *See* Pet. App. 66a (finding that Rule 702 "does not clarify the term ... for the average person with no background in the law"). It cannot seriously be doubted that a statute making it a crime to publish anything derived from "scientific, technical, or other specialized knowledge" would be unconstitutionally vague – just as would a statute making it a crime to publish information whose prejudicial or confusing character outweighed its probative value, even though that, too, is a standard routinely applied by judges. Fed. R. Evid. 403.

Moreover, the "expert advice or assistance" definition is radically more open-ended than Rule 702. It requires citizens to guess not only at what constitutes scientific, technical, or other specialized knowledge, but at what is "derived" from such knowledge, an even more capacious and ambiguous category.

C. Service

The most expansive provision in the definition of "material support" is the prohibition on providing any "service" to a designated group, which Congress added in 2004 without supplying a definition. The courts below correctly held this prohibition unconstitutionally vague, as it provides literally no guidance as to what speech is prohibited or permitted.

Citing a dictionary, the government maintains that the term prohibits any "act done for the benefit ... of another." Pet. 17. But how does one determine whether a speech, for example, about the human rights of Kurds is done "for the benefit of" the PKK? What about a letter to the State Department objecting to the detention on political grounds of a PKK member? When the *New York Times*, *Washington Post*, and *Los Angeles Times* published op-ed essays by Hamas spokespersons in the past two years, were they violating the law by providing a "service" to a designated group?[16]

---

[16] *See* Mousa Abu Marzook, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at A15 (by deputy of the political bureau of Hamas); Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23 (by founder of Hamas and foreign minister in Hamas led government); Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19 (by political adviser to Hamas leader Ismaiel Haniya); Ahmed Yousef, *Engage With Hamas, We Earned Our Support*, Wash. Post, June 20, 2007, at A19. Hamas is a designated "foreign terrorist organization." www.state.gov/s/ct/rls/other/des/123085.htm.

At the same time that the government contends that "service" prohibits anything done "for the benefit of" a designated group, it also contends that advocating "on behalf of the PKK" is permitted (so long as one also avoids acting at "the direction of" the proscribed group, which would constitute the provision of "personnel"). Govt. Mem. in Supp. of S.J. at 17 n.8; *see also* D. Ct. Tr. 7; C.A. SER 218. Thus, Judge Fertig and the HLP must attempt to distinguish between speaking "on behalf of" the PKK, which is assertedly permissible, and speaking "for the benefit of" the PKK, which is a crime. The government has yet to explain how speech on an organization's behalf would not also be for its benefit. Yet a fifteen-year criminal sentence could turn on the distinction.

The "service" prohibition also forces individuals to guess whether joining or affiliating with a group is prohibited. Before the "service" prohibition was added in 2004, the government represented that citizens were free under the material-support statute to join designated groups, and that concession was critical to the court of appeals' rejection of plaintiffs' right-of-association challenge. *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1133-34 (9th Cir. 2000) (rejecting First Amendment right-of-association challenge because the statute permits membership and affiliation with foreign terrorist organizations). But with the statute's new ban on "service," membership and affiliation are now in doubt. A reasonable person could readily understand any joining or affiliating with a political organization to be "for [its] benefit." How can one distinguish between ostensibly permitted membership and association, on the one hand, and "service," on the other? Such confusion is intolerable where, as here, criminal prosecution for activities protected by the First Amendment is at stake.

D. Personnel

Two separate panels of the court of appeals unanimously held that the statute's original ban on providing "personnel" criminalized protected speech and was unconstitutionally vague. *See supra*, note 9. After Congress amended the provision in 2004 to limit "personnel" to persons acting under a recipient organization's "direction or control," while exempting "entirely independent" activity, the court held that the "personnel" ban sufficiently apprises individuals of the proscribed zone. Pet. App. 26a-27a.

The amended definition of "personnel," however, continues to leave the statute's reach intolerably vague. "Direction or control" could mean many things of potential, but uncertain, applicability to the speech plaintiffs propose. The fact that Congress drafted a narrow exception only for "*entirely* independent" activity leaves citizens wondering whether the prohibition covers all or just some parts of the vast gray area between complete control and complete independence, encompassing myriad forms of coordination, collaboration, consultation, and communication.

For example, what if Judge Fertig offered his legal services to work with the PKK in presenting a human rights petition to the U.N.? A lawyer might well be said to act under the "direction" of his client, as, subject only to professional obligations, the client's wishes are controlling. But when this very issue arose in the prosecution of a lawyer under the "personnel" provision, the government opined that a lawyer acting as "house counsel" would be acting impermissibly under the organization's "direction or control," but an outside counsel doing the same work could be seen as "independent." *United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003). The court in *Sattar* concluded that such distinctions were too unclear to pass muster, and declared the "personnel" ban unconstitutionally vague. *Id.*[17]

If plaintiffs wanted to write an op-ed essay defending the PKK and criticizing its designation as "terrorist," would coordinating the drafting with a PKK leader constitute criminal acceptance of "direction"? A reasonable person might fear that such collaboration would negate a claim that the essay was written "entirely independently." What if the author accepted three of the leader's five editorial suggestions, or only two? What if the author coordinated with the PKK the timing of the essay's submission for publication? Any coordination at all might risk prosecution.

For related reasons, the "personnel" provision is vague with respect to associational rights. It does not provide an adequate distinction between membership in or affiliation with a designated group, which the government has said the statute permits, *cf. HLP I*, 205 F.3d at 1134, and providing the group with "personnel," which is a crime. In the *Sattar* case, the government was unable to articulate any coherent distinction between the two actions:

---

[17] The *Sattar* case preceded the 2004 amendment to the "personnel" prohibition, but the government in that case maintained that the "personnel" prohibition should be construed as limited to action under a designated group's "direction or control." *See Sattar*, 272 F. Supp. 2d at 360. Government counsel's explication therefore remains relevant to the meaning of the amended statute, which expressly adopted the "direction or control" limitation.

> When asked at oral argument how to distinguish being a member of an organization from being a quasi-employee, the government initially responded "You know it when you see it." ... While such a standard was once an acceptable way for a Supreme Court Justice to identify obscenity, see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring), it is an insufficient guide by which a person can predict the legality of that person's conduct. See *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002) ("It is not enough to say that judges can intuit the scope of the prohibition if [the defendants] could not.")

Sattar, 272 F. Supp. 2d at 359-60. The amended definition does nothing to clarify how one can associate with a designated group without acting in some respect under its "direction or control." Plaintiffs reasonably fear that any affiliation or collaboration may render them criminally liable.

E. The Interaction of the Provisions Exacerbates Their Vagueness

The confusion generated by each of the above prohibitions is exacerbated by their interaction. The provisions, read together, are hopelessly contradictory, or at least their collective meaning is so muddled as to leave would-be speakers uncertain about what is forbidden. Similar contradictions have supported invalidation for lack of constitutionally required fair notice even when speech was not at issue. *See, e.g.*, *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952); *Raley v. Ohio*, 360 U.S. 423, 438 (1959).

For example, the "service" prohibition appears to conflict with the narrowing limitations Congress simultaneously placed in the definitions of "training," "expert advice," and "personnel." Teaching a subject of "general knowledge" or providing advice derived from non-specialized knowledge is expressly carved out of the "training" and "expert advice" provisions, but if done "for the benefit of" a designated group it would appear to be prohibited as a service. (Indeed, what training or advice would not be done "for the benefit of" the group?) Similarly, the "personnel" definition exempts acts done "entirely independently of the ... organization to advance its goals or objectives," 18 U.S.C. § 2339B(h), but such activity could reasonably be thought to be "for the benefit of" the organization, and therefore simultaneously proscribed by the "service" prohibition.

Congress specifically provided that the statute should not be construed or applied to outlaw protected speech, *id.* § 2339B(i), but publishing an article praising the humanitarian work of a designated organization to improve its reputation would be simultaneously protected speech and presumably a service done "for the benefit of" the organization. Is it, then, criminal or not? One can only guess.

Likewise, training or legal advice on a subject of "general knowledge" would presumably not be a crime under the definitions of "training" and "expert advice," but would be a crime if its provision involved coordination with the group that amounted to acting under its direction.

Navigating through the internally contradictory signals of these overlapping provisions is simply impossible. Reading the provisions together, a would-be speaker would find it a mystery what Congress thought it was prohibiting and permitting.

F. The Government's Defense of the Challenged Provisions Fails to Account for the Fact that They Criminalize Pure Speech

Rather than attempt to answer the many questions raised about the meaning of the challenged terms, the government in its petition merely cited inapposite examples from contexts where First Amendment interests and/or criminal penalties were *not* at stake. Pet. 13-18. But as noted above, vagueness standards are at their most demanding when a criminal prohibition affects speech. *Reno v. American Civil Liberties Union*, 521 U.S. at 871-72. Many of the cases the government cited do not even address vagueness, and all arise from non-speech or non-criminal contexts that tolerate more lenient vagueness standards – determining an appropriate attorney's fee (Pet. 15),[18] admitting expert evidence in court (Pet. 16),[19] prohibiting the overseas transfer of money (Pet. 17)[20] or heavy equipment (Pet. 18),[21] or noncriminal regulation of public employees' speech (Pet. 14).[22] These cases have no bearing on plaintiffs' challenge, which tests the validity of terms used to criminalize pure political speech. In the present setting, the demand for clarity is at its zenith, because otherwise citizens will be forced to steer clear of anything approaching the prohibited zone, and free speech will be the loser. That the statutes at issue have deterred plaintiffs for so long from providing training and assistance in human rights and peacemaking, and from advocating on behalf of disadvantaged ethnic minorities, illustrates that the dangers of vague prohibitions are all too real.

---

[18] *Pierce v. Underwood*, 487 U.S. 552, 572 (1988), involved the standards employed for awarding statutory attorneys' fees. It presented no vagueness challenge, and did not involve a criminal statute at all, much less a prohibition of speech.

[19] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999), did not address any vagueness issue, and as noted above, involved the very different setting of evidentiary standards for judicial governance of a trial.

[20] *United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (holding that transferring money for a fee was undeniably a service, where no issues of speech were raised).

[21] *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 73-77 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986), upheld a conviction for shipping construction equipment to Iran in violation of a complete ban on such transactions. No speech or associational rights were at stake. Defendants made what the court characterized as a "tortured" argument that a separate provision of the statute, governing "service contracts," should be construed to create a loophole permitting what the statute plainly forbade. The court rejected that interpretation as wholly inconsistent with the plain meaning of the statute's flat ban, and accordingly also rejected defendants' related argument that the statute, as they had tortuously construed it, was unconstitutionally vague.

[22] The government's one cited authority involving speech is *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001). There, the court rejected a facial vagueness challenge to a law that required public school teachers to use English predominantly in their instruction. In that context, involving the somewhat curtailed speech interests of public employees in public schools and no apparent criminal penalties,

G. The Provisions Are Overbroad Because Their Application to a Substantial Amount of Speech Is Unclear

For the foregoing reasons, the provisions at issue are vague as applied to plaintiffs' proposed speech. The same arguments also support a broader conclusion, namely, that the vagueness of the terms as applied to *all* speech renders the provisions facially invalid.

While there is undoubtedly a small fraction of pure speech that could constitutionally be prohibited, such as incitement to crime, the statute makes no attempt to limit its application to such speech. Instead, it prohibits *all* speech that constitutes

---

the court explained that the law made clear that "instruction" was tied to the "curriculum," and on that basis found no substantial number of instances where there would be doubt about when English had to be used (for classroom presentation of the curriculum), and when it did not (in private conversations with students and parents).

"training," "expert advice," "service," or "personnel." These provisions are profoundly unclear in what they prohibit, not just as applied to plaintiffs' proposed speech, but as applied to a seemingly limitless range of teaching, advice, and advocacy of lawful activity, all of which is constitutionally protected. *See infra*, Point III. The vagueness of the provisions as applied to this wide variety of speech renders the statute substantially overbroad on its face; indeed, the apparent prohibitions of protected speech dwarf their application to unprotected speech. *See United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (noting that "in the First Amendment context, [we] permit[] plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

III. THE CHALLENGED PROVISIONS IMPERMISSIBLY CRIMINALIZE PURE SPEECH AND DISCRIMINATE ON THE BASIS OF CONTENT

The challenged provisions independently violate the First Amendment because they impermissibly criminalize pure political speech advocating lawful, nonviolent activity, and discriminate on the basis of the speech's content.[23] Throughout this litigation, the government has never cited, and we are unaware of, any authority from this Court upholding such blanket criminalization of pure political speech that seeks to further only lawful, nonviolent activities.

---

[23] Plaintiffs argued below that the material-support statute as a whole, as well as the specific provisions at issue here, were invalid as applied and on their face because they were content-based and overbroad penalties on speech, and because they imposed guilt by association, in violation of the First and Fifth Amendments. The court of appeals rejected those contentions. Plaintiffs have preserved the arguments, and they are independent bases for affirming the injunction below, and for

Three features of the challenged provisions as applied here are critical to the First Amendment analysis. First, as noted above, plaintiffs' proposed speech is pure political speech. *See supra*, Point I. Human rights advocacy, peacemaking, petitioning for redress of grievances, and advocacy on behalf of ethnic minorities are at the core of what the First Amendment protects.

Second, the challenged provisions impose a complete criminal prohibition on such speech. The challenged provisions do not constitute a zoning regulation, a regulation of the time, place, or manner of speech, or a regulation of conduct – expressive or otherwise. Rather, they work a complete ban of certain kinds of constitutionally protected speech.

Third, the provisions discriminate based on content, favoring or disfavoring speech depending on whether it imparts "specific skills" or "general knowledge," is "for the benefit of" a group, or consists of "religious materials" or non-religious materials. And all of the provisions selectively prohibit speech only when it is communicated to, at the direction of, or for the benefit of particular political organizations.

These factors trigger the most stringent scrutiny, and the provisions manifestly fail that scrutiny.

---

expanding it as plaintiffs request in their cross-petition.

A. Strict Scrutiny Applies Because the Challenged Provisions Criminally Proscribe Pure Political Speech

Despite the use of the term "material support," 18 U.S.C. § 2339B is not limited to barring financial support, tangible goods, and the like. Rather, its criminal sanctions extend to pure speech itself. And according to the government, the statute's prohibitions reach even speech that is designed to *discourage* terrorism and to promote only lawful, nonviolent activities. Only a "'need ... of the highest order'" can justify "a regulation of pure speech." *Bartnicki*, 532 U.S. at 532, 526; *Cox Broadcasting*, 420 U.S. at 495 (applying strict scrutiny to statute penalizing "pure expression"); *Cohen v. California*, 403 U.S. at 18-19 (applying strict scrutiny to conviction for pure expression).

The fact that the statute imposes a complete criminal ban rather than a time, place, or manner regulation underscores the need for exacting scrutiny. This Court has applied more relaxed scrutiny to laws that impose content-neutral restrictions on the time, place, or manner of speech, but do not criminalize it altogether. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1999) (upholding restriction on volume of speech in public park as "time, place, or manner" regulation where it was content-neutral and left open ample alternative avenues for expression). The provisions challenged here criminalize plaintiffs' speech altogether, thereby triggering the First Amendment's most skeptical scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) (plurality) ("[A]n ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban."); *id.* at 445 (Kennedy, J. concurring) (same).

Here, the statute flatly bans certain kinds of speech *to* designated organizations, *e.g.*, training of or advising their members. Such a ban on speech to a chosen audience, indeed willing listeners, triggers strict First Amendment scrutiny.[24] Similarly, nothing less than strict scrutiny can apply to a law that criminally punishes, as a "service" or provision of "personnel," speech advocating peaceable nonviolent activity that is delivered for a designated organization's benefit, or under its direction. *See De Jonge v. Oregon*, 299 U.S. 353 (1937), discussed *infra* pp. 53-55.

The fact that the statute reaches speech that implicates foreign affairs does not reduce the need for stringent First Amendment review. *Boos v. Barry*, 485 U.S. 312 (1988) (striking down regulation barring demonstrations that criticized foreign governments within 500 feet of a foreign embassy). Political speech is central to self-government, *Whitney v. California*, 274 U.S. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and self-government includes foreign as well as domestic affairs. International communications are a central aspect of the robust public debate that the First Amendment is designed to protect. *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (protecting First Amendment rights of Americans to receive Communist literature from abroad).

---

[24] *FCC v. League of Women Voters of California*, 468 U.S. 364, 384 (1984) (ban on editorializing denies "the right to address *their chosen audience* on matters of public importance") (emphasis added); *McConnell v. FEC*, 540 U.S. 93, 335 (2003) (Kennedy, J., concurring in part and dissenting in part) (a law "that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him," would be "unconstitutional under any known First Amendment theory").

B. Strict Scrutiny Applies Because the Provisions Discriminate on the Basis of Content

Laws that discriminate on the basis of content, even if they do not impose criminal bans, also trigger the Court's most stringent scrutiny. "A statute is presumptively inconsistent with the First Amendment" if it discriminates against "speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("Since [the law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.").

"[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by its content, then it is content based." *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (finding ban on "editorializing" content-based because authorities "must necessarily examine the content of the message that is conveyed to determine whether the views expressed" are proscribed).

Most of the challenged provisions discriminate on the basis of content in obvious ways. The "training" ban prohibits instruction or teaching where its content consists of imparting "specific skills," but not "general knowledge." *Cf. Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230 (1987) (state law that imposed tax on "general interest" magazines but not professional, trade, sports, and religious magazines was content-based). The "expert advice" ban criminalizes the giving of advice only when its content "derives from scientific, technical, or other specialized knowledge." And the "service" ban, as the government reads it, prohibits speech expressed "for the benefit of" a designated group, but not speech that criticizes the group. At the same time, the statute expressly favors speech with religious content, permitting unlimited donations of "religious" but not secular materials. 18 U.S.C. § 2339A(b) (exempting "medicine or religious materials" from the material-support ban).

All the challenged provisions, moreover, including the "personnel" provision, discriminate in an additional way. They punish speakers for speech communicated to, for the benefit of, or directed by certain organizations but not others, with the government making the selection based on inherently political assessments about whether a group's activities are consistent with United States "foreign policy" or "economic interests." Just as statutes that discriminate against selected speakers are suspect,[25] so, too, is the discrimination as to a speaker's chosen audience, beneficiary, or director here. This is a form of content discrimination: speech to, for the benefit of, or under the direction of the PKK is treated as pro-PKK, and therefore criminalized, whereas otherwise-comparable speech to, for the benefit of, or under the direction of the PLO, no matter how pro-PLO, is allowed.[26]

---

[25] *See, e.g., Greater New Orleans Broadcasting Ass'n, Inc. v. United States,* 527 U.S. 173, 190 (1999) (government cannot

Just as a law banning speech to or for the benefit of the Republican Party while permitting the same speech to or for the benefit of the Democratic Party would be content-based, so, too, is a law that selects the PKK, LTTE, and other groups from among countless similar organizations around the world on

---

restrict advertising for private casinos while allowing advertising for tribal casinos); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (a tax that "singled out the press for special treatment" is unconstitutional); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned ... discrimination among different users of the same medium for expression."); *Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.") (citing *Mosley*, 408 U.S. at 96).

[26] Government counsel made this content-discriminatory purpose clear at oral argument before the court of appeals. Asked whether filing an amicus brief on behalf of the LTTE in this case would be a crime, counsel replied, "Yes because Congress wants these organizations to be radioactive. ... We don't want U.S. lawyers, other U.S. persons, to be saying, 'Yeah, I want to help them in a *good* way,' because that adds to the goodwill and the standing of the organization." C.A. Oral Argument Tape, *supra* note 7, at 34:30. The government's concern, in other words, is with speech that sends a message that a disfavored organization is legitimate and deserves goodwill.

expressly political grounds, and then proscribes speech that sends messages that promote those groups' "goodwill." *See supra,* note 26.

The government argues that the statute is content-neutral because it is motivated by the legitimate purpose of deterring terrorist activity. Pet. 19-20. But the asserted legitimacy of the government's motive does not change the fact that the statute contains provisions that are content-based on their face. A law that banned all speech praising terrorism would indisputably be content-based, even if it were motivated by the same purpose of deterring terrorist activity. The "assertion of a content neutral purpose [is not] enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System Inc. v. FCC,* 512 U.S. 622, 642 (1994); *Simon & Schuster,* 502 U.S. at 117 ("[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").[27]

---

[27] *Hill v. Colorado,* 530 U.S. 703 (2000), does not alter this conclusion. In *Hill,* the Court upheld a law that regulated the manner in which speakers could approach individuals within 100 feet of a health care facility. The Court viewed the law as a reasonable time, place, and manner restriction, emphasizing that it was content-neutral, only regulated the manner in which speech could be expressed to unwilling listeners, and left ample alternative channels for communication. *Id.* at 719-30. Over dissents, the majority deemed the statutory language, addressing "oral protest, education, or counseling," as equivalent to a neutral regulation of "picketing." *Id.* at 721. Here, by contrast, the challenged provisions impose a complete ban, not a regulation of the manner of speech, and the ban is expressly content-based. Indeed, in over ten years of litigation, the government has never even sought to defend the challenged provisions as a "time, place, or manner" regulation.

C. The Challenged Provisions Cannot Survive Strict Scrutiny

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995). Content-based laws may be upheld only where the government establishes that the particular content distinctions drawn are "the least restrictive means" to further a compelling state interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Importantly, the Court has repeatedly held that pure political speech like plaintiffs', advocating peaceable, nonviolent ends, may *not* be criminalized in order to forestall others from engaging in illegal conduct, even where that illegal conduct threatens national security.

While combating terrorism is undoubtedly a compelling state interest, the government has not shown that criminalizing pure political speech advocating peaceful, lawful activities is necessary to further that interest. Nor has it pointed to anything in the legislative record – in 1996, in 2001, or in 2004 – that reflects a specific congressional focus on such speech, let alone a determination that banning it is necessary or, even, advisable. The congressional expressions of concern to protect speech suggest the contrary. *See* Statement, *supra*, p. 7. There is simply no evidence in the litigation or legislative records to show that criminally proscribing speech promoting peaceable, lawful conduct will further the interest in reducing terrorist activity at all, much less that it is *necessary* to do so.

In defending the statute's prohibitions on financial support, the government below relied on the notion that money is "fungible," so that support for lawful activities might free up resources that the recipient organization can use for terrorist activity. But that theory, about *money*, has no application to the speech at issue in this as-applied challenge. Indeed, the 1996 congressional "finding" that the government relies upon is by its terms limited to "contributions." *See* Statement, *supra*, p. 7. And if the finding were applied to speech advocating lawful, nonviolent activity, it would deserve no deference, as it lacks any evidentiary support. *See Bartnicki*, 532 U.S. at 530-31 & n.17 (dismissing congressional finding advanced to support statute criminalizing speech because "the relevant factual foundation is not to be found in the legislative record").

More importantly, the Court has repeatedly rejected the proposition that otherwise-lawful speech may be prohibited in order to deter criminal conduct by a third party. In *Bartnicki*, for example, the Court held unconstitutional a civil statute that penalized the publication of illegally intercepted cell phone conversations as applied to an individual who had obtained the communications legally (from someone else who had illegally intercepted them). The Court rejected the government's attempt to justify the statute on the ground that it would deter illegal interceptions by others: "It would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. Similarly, plaintiffs' speech, advocating only lawful, nonviolent activities, cannot be proscribed on the basis of mere speculation that such a prohibition might somehow deter the PKK or the LTTE from engaging in terrorist activity.

Similarly, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down a federal statute banning "virtual child pornography," and rejected the government's argument that the restriction was necessary because such materials might be used to seduce children, or might increase demand for child pornography using actual children. As the Court explained, "the government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id. at* 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*)). Here, as in *Free Speech Coalition*, "the harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

This principle dates back to some of the Court's earliest First Amendment decisions. In *De Jonge v. United States*, 299 U.S. 353, the Court invalidated a conviction under a criminal syndicalism statute of an individual who spoke on behalf of the Communist Party at a meeting held under Party auspices, at which he sought to recruit members to the Party. The Court accepted that the Party engaged in illegal activities, and that De Jonge acted under the Party's auspices, but held that he could not be convicted because he advocated only "peaceable" activity. *Id.*

at 365. The Court noted that if individuals are "engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy." *Id.* But, the Court continued, "it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*

In *NAACP v. Claiborne Hardware*, 458 U.S. at 908-09, 932-34, the Court relied on *De Jonge* to hold that the leader of and participants in an economic boycott could not be held liable for illegal violence that attended the boycott absent proof that they engaged in or directly incited the violence. *Id.* at 928 ("[W]hen an advocate's] appeals do not incite lawless action, they must be regarded as protected speech.").

Even where speech directly advocates criminal conduct, the Court has held that it may not be penalized unless it is in fact intended and likely to produce "imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. at 108-09 (holding that the First Amendment prohibits application of a disorderly conduct statute to pure speech that, while advocating illegal activity, did not incite it). If the government is not permitted to penalize direct advocacy of *illegal* activity except in circumstances where it constitutes incitement to imminent crime, surely it cannot criminalize plaintiffs' proposed speech, which promotes only lawful, peaceful activities, and does not urge criminal conduct of any kind.

The government will not be deprived of its considerable arsenal of legal tools to combat terrorism if the limited provisions at issue here are invalidated as applied to speech advocating peaceable, nonviolent action. Indeed, given Congress's statement that the material-support statute may not be "construed or applied" in ways that violate the First Amendment, 18 U.S.C. § 2339B(i), it is doubtful that Congress even intended to criminalize such speech. *See infra*, Point VI. Plaintiffs' requested relief would leave the statute in place, to be employed against those providing material support in the form of financial aid and other non-speech support, as well as against those whose speech is unprotected. In addition, the government would still be able to invoke other laws to prosecute those who support terrorist activity, conspire to engage in terrorist activity, or aid or abet such activity.[28] The government has made no showing that any successful prosecution under § 2339B would have been prevented if speech advocating lawful, nonviolent activity were protected.

In short, the government has utterly failed to meet its heavy burden of justification under strict scrutiny.

---

[28] *See, e.g.*, 18 U.S.C. § 2339A (prohibiting material support of terrorist crimes); 18 U.S.C. § 2339C (prohibiting financing of terrorism with knowledge that the funds will be used for specific offenses); 18 U.S.C. §§ 1961-68 (Racketeering Influenced and Corrupt Organizations Act); 18 U.S.C. § 2 (aiding and abetting); 18 U.S.C. § 371 (conspiracy).

IV. THE CHALLENGED PROVISIONS VIOLATE THE RIGHT OF ASSOCIATION

The challenged provisions also violate the right of association. As discussed above, the challenged provisions penalize speech only when it is communicated to, for the benefit of, or under the direction or control of disfavored associations. *See supra*, Point III.B. This association-based trigger for penalizing speech violates the First and Fifth Amendments. In addition, the "service" and "personnel" provisions directly penalize association because, as noted above, the mere act of joining or associating with a group could be viewed as benefiting the group or acting at the group's "direction." *See supra*, Point II.C-D.

This Court has confronted similar penalties triggered by association with disfavored organizations before. In the 1950s, Congress imposed analogous restrictions on the Communist Party, after expressly finding that it was a foreign-dominated organization that used terrorism and other illegal means in seeking to overthrow the United States by force and violence.[29] This Court did not question Congress's findings regarding the Communist Party's illegal ends and terrorist means, but nonetheless insisted that the First and Fifth

---

[29] Congress found that there "exists a world Communist movement ... whose purpose it is, by treachery, deceit, infiltration ... espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." 50 U.S.C. § 781 (West 1991) (repealed 1993), quoted in *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 n.8 (1964).

Amendments precluded any penalty for association with the Communist Party unless an individual *specifically intended* to further its *unlawful* ends.[30]

De Jonge v. Oregon, discussed above, demonstrates that the principle fully applies to active association with organizations engaged in illegal activity. The Court there unanimously reversed De Jonge's conviction for his active participation in a gathering held under the Communist Party's auspices, because De Jonge's activities did not promote illegal conduct:

> [P]eaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose.

---

[30] *See, e.g., United States v. Robel*, 389 U.S. 258, 262 (1967) (holding that the government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (applying same principle to criminal statute). The same principle applies to other organizations. *See NAACP v. Claiborne Hardware*, 458 U.S. at 920.

299 U.S. at 365. *See also NAACP v. Claiborne Hardware*, 458 U.S. at 908-09 (relying on *De Jonge* to hold that those who participated in the lawful aspects of an economic boycott could not be held liable for injuries caused by illegal, violent aspects of the boycott).

Here, as in *De Jonge*, plaintiffs seek to engage in lawful peaceable speech and association. The challenged provisions criminalize their speech solely because of its association with organizations that have been proscribed, like the Communist Party, for their illegal activities (coupled with political considerations). *De Jonge* establishes, however, that the government may not proscribe peaceable expression and association because of the nature of the group with which an individual speaks and associates.

The government attempts to distinguish these precedents on the ground that the material-support law penalizes the conduct of material support, not association itself. Pet. 19. But that rationale is inapplicable to the provisions as applied here, which penalize not conduct, but *pure speech*. Plaintiffs seek to protect only pure speech, and thus the provisions as applied here penalize no conduct at all. *See supra* pp. 17, 23-24.

The fact that the challenged provisions simultaneously target speech and association makes them doubly invalid. Speech nearly always involves some associational element, in that speakers speak *to* listeners, and, particularly when it comes to political expression, often speak *in association with* others. *NAACP v. Claiborne Hardware*, 458 U.S. at 908 ("'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'") (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

Here, the statute selectively criminalizes speech on the basis of the association of speaker and listeners. According to the government, the statute requires no showing of intent to further a designated group's unlawful activities. As applied to plaintiffs' intended speech, therefore, the challenged provisions violate this Court's long-established principle that association may not be penalized absent proof that an individual specifically intended to further an organization's illegal ends.

V. *O'BRIEN* IS NOT APPLICABLE AND WOULD NOT SAVE THE CHALLENGED PROVISIONS AS APPLIED TO PLAINTIFFS' PROPOSED SPEECH

The government has incorrectly suggested that the challenged provisions are sustainable as a content-neutral regulation of conduct under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Pet. 19-20. The *O'Brien* intermediate scrutiny standard does not apply in this case for three reasons: (1) as applied, the challenged provisions regulate not conduct, but pure speech; (2) they do so on content-based grounds; and (3) they directly infringe expressive association. In any event, the provisions as applied here would not satisfy intermediate scrutiny, because the government cannot establish that penalizing plaintiffs' pure speech promoting peaceable, nonviolent activities is remotely tailored to serve any legitimate interest.

A. *O'Brien* Is Inapplicable

The Court has applied *O'Brien*'s intermediate standard of review to laws that regulate conduct directly, but incidentally affect expression connected with the regulated conduct. In *O'Brien* itself, the Court upheld a regulation that prohibited the destruction of draft cards as applied to an individual who burned his draft card to protest the war. 391 U.S. at 369. The government had a legitimate, speech-neutral reason for preserving draft cards to sustain the orderly functioning of the selective service. *Id.* at 380. The fact that O'Brien sought to violate the law to make a political point did not render the prohibition of his conduct invalid, where the government's interest in regulating the conduct was unrelated to expression. *Id.*

That reasoning is inapplicable here for multiple reasons. First, *O'Brien* is limited to regulation of expressive *conduct*. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("[G]overnment generally has a freer hand in restricting expressive *conduct* than it has in restricting the *written or spoken word*") (emphasis added). Thus, the *O'Brien* standard by its terms would not apply to a ban on *speech* opposing the draft. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) ("The four-part enquiry described in *United States v. O'Brien*, judg[es] the limits of appropriate state action burdening expressive acts *as distinct from pure speech or representation*") (emphasis added) (citation omitted).

In *Cohen v. California*, 403 U.S. 15 (1971), for example, involving a conviction for wearing a jacket with an offensive anti-draft expression, the Court rejected application of *O'Brien* or any other lower form of scrutiny, because Cohen was penalized not for his conduct, but for "communication":

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a *conviction resting solely upon 'speech,'* not upon any separately identifiable conduct ....

Id. at 18 (emphasis added).

Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court refused to apply the *O'Brien* standard to Georgia's rape shield law, stating:

> The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition.

Id. at 495 (citing *O'Brien*, 391 U.S. at 376-77).

The fact that *other* aspects of the statute prohibit conduct does not make *O'Brien* applicable to the provisions at issue here. If the regulation in *O'Brien* had banned not only draft card destruction, but also speech critical of the draft, a prosecution for an anti-draft speech would not have triggered *O'Brien* intermediate scrutiny. In order for *O'Brien* to apply at all in an as-applied challenge, the law in question must be applied to conduct, not speech itself. But plaintiffs' proposed activities are pure speech.

Second, *O'Brien* is limited to content-neutral laws, and the provisions challenged here discriminate on the basis of content. In *Texas v. Johnson*, 491 U.S. at 402-03, for example, the Court declined to apply *O'Brien* to a law banning flag desecration because it concluded that the law discriminated on the basis of content. Where, as here, a statute on its face targets expression based on its content, the government's interest cannot be said to be "unrelated to the suppression of free expression," a critical threshold requirement for *O'Brien* scrutiny. *O'Brien*, 391 U.S. at 377.

Third, *O'Brien* does not apply where, as here, a law directly regulates expressive association. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), the Court held *O'Brien* inapplicable where a state's general ban on discrimination in public accommodations was applied to the Boy Scouts in a way that "directly and immediately affects associational rights" (by restricting its ability to choose who would serve as a scoutmaster). As the Court explained:

> A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

Id. at 659. The Court similarly rejected the invocation of *O'Brien* to defend patronage practices because they directly regulated pure association. *Elrod v. Burns*, 427 U.S. 347 (1976). As the Court explained, "*O'Brien* dealt with the constitutionality of laws regulating the 'nonspeech' elements of expressive conduct. No such regulation is involved here, for it is association and belief *per se*, not any particular form of conduct, [that is at issue]." *Id.* at 363 n.17.

As in *Elrod* and *Dale*, so here, the application of the law directly infringes plaintiffs' rights of expressive association. It "directly and immediately" precludes them from engaging in speech in association with the PKK or the LTTE. *O'Brien* therefore does not apply.

The government argued below that the material-support law is analogous to laws this Court has upheld restricting trade and travel with particular foreign nations. *See, e.g., Regan v. Wald*, 468 U.S.

222 (1984). But the trade and travel regulations are critically different. They regulate *conduct* (travel and financial transactions), not pure speech. So while an individual who engages in the *conduct* of proscribed trade or travel for expressive purposes would find his challenge analyzed under *O'Brien*, the provisions as applied here criminalize pure speech and association. In *Regan v. Wald* itself, the Court pointedly distinguished the permissible "general ban on travel to Cuba" from impermissible efforts to "selectively ... deny passports on the basis of political affiliation" with the Communist Party, struck down in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), and *Kent v. Dulles*, 357 U.S. 116 (1958). *See Regan*, 468 U.S. at 241. Thus, intermediate scrutiny is not applicable here.

B. The Challenged Provisions Could Not Survive Even Intermediate Scrutiny

Were the Court to apply intermediate scrutiny, the challenged provisions would still fail. *O'Brien* holds that a regulation of conduct that incidentally affects speech will be sustained:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The provisions as applied here fail intermediate scrutiny because – even aside from their being anything but unrelated to the suppression of expression[31] – they "burden ... more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. While intermediate scrutiny does not demand that the government use the least restrictive means to further its ends, it still must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting*, 512 U.S. at 664. Without evidence that speech advocating wholly lawful, nonviolent ends furthers terrorism, the government has not met its burden of showing the requisite fit between these provisions and its legitimate national security interests, even under the more lenient *O'Brien* standard.

VI. THE COURT CAN AVOID THESE CONSTITUTIONAL PROBLEMS BY INTERPRETING THE STATUTE TO PROHIBIT ONLY SPEECH INTENDED TO FURTHER UNLAWFUL ENDS

In the courts below, plaintiffs argued that the statute should be interpreted to prohibit only speech intended to further a group's illegal ends. The lower courts declined to adopt such an interpretation with respect to the statute as a whole. But adopting such an interpretation with respect to the provisions challenged here would be consistent with Congress's directive that the statute not be "construed or applied" in a way that would violate First Amendment rights. 18 U.S.C. § 2339B(i). Such an interpretation would also fully support the relief plaintiffs seek, while avoiding substantial constitutional questions. *Jones v. United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal citations omitted).[32]

---

[31] The Court in more recent cases has treated the criterion that a measure be "unrelated to the suppression of expression" as a threshold requirement for application of *O'Brien* at all, and accordingly plaintiffs addressed it above. *See supra*, Point V.A.

A. The Statute Should Be Interpreted to Require Proof of Intent to Further a Designated Organization's Illegal Ends

The Court can avoid the constitutional problems identified above if it interprets the challenged provisions to require proof of intent to further the designated organization's illegal activities when applied to pure speech and association. This Court adopted precisely that interpretation of the Smith Act in *Scales v. United States*, 367 U.S. 203 (1961). The relevant language of the material-support statute is, if anything, even more susceptible to such an interpretation than the Smith Act.

---

[32] The construction plaintiffs propose, requiring proof of intent to further a group's terrorist activities, would not necessarily *save* the statute's constitutionality in every context, but because it would fully protect plaintiffs here, it would permit the Court to *avoid* resolution of a constitutional question.

The Smith Act criminalized "membership" in organizations that advocated violent overthrow, "knowing the purpose thereof." 18 U.S.C. § 2385. The statute did not by its terms require intent to further the group's illegal aims. Yet to avoid due process and First Amendment concerns, the Court interpreted the statute to require, not merely the knowledge of the group's purposes specified on the face of the statute, but also "'specific[] inten[t] to accomplish [the aims of the organization] by resort to violence.'" *Scales*, 367 U.S. at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

On its face, the material-support statute also criminalizes "knowing" provision of training, expert advice, service, and personnel, and raises similar constitutional concerns. Here, as in *Scales*, the Court can avoid those constitutional questions by interpreting the statute to require proof of intent to further a designated organization's illegal ends.

The court of appeals declined to adopt this interpretation. It reasoned that the statute in *Scales* was "silent as to *mens rea*," whereas 18 U.S.C. § 2339B includes a requirement that defendants "know" that the organization they are supporting is designated "terrorist" or has engaged in violent activities. The court concluded that it would be inconsistent with Congress's requirement of "knowledge" of the group's terrorist character to also require "intent" to further the group's illegal activities. Pet. App. 16a.

Contrary to the court of appeals' reasoning, however, the Smith Act interpreted in *Scales* was not silent on *mens rea*. Like 18 U.S.C. § 2339B, it required "knowing" support. This Court nonetheless concluded that to preserve the statute's constitutionality, it should be interpreted to require specific intent to further the Party's illegal ends. A heightened intent requirement, to avoid constitutional difficulties, is thus consistent with an express "knowing" requirement.

With respect to § 2339B, there is both statutory language and legislative history to support this narrowing construction – neither of which existed in the Smith Act. Congress expressly invited such an interpretation when, aware that courts had identified constitutional flaws in the statute, it provided in 2004 that the statute should not be "construed or applied" in a manner that would violate the First Amendment. 18 U.S.C. § 2339B(i).

When Congress first enacted the statute, moreover, it stated that it sought to prohibit material support "to the fullest possible basis, consistent with the Constitution." AEDPA, § 301(b), 18 U.S.C. § 2339B note. The bill's sponsor, Senator Orrin Hatch, stated in introducing the Conference Report that:

> [t]his bill also includes provisions making it a crime to knowingly provide material support *to the terrorist functions* of terrorist groups designated by a Presidential finding to be engaged in terrorist activities. ... I am satisfied that we have crafted a narrow but effective

> designation provision which meets these obligations *while safeguarding the freedom to associate.*[33]

To interpret the challenged provisions here to include a specific intent requirement when speech and association are at issue would accord with the Court's treatment of the Smith Act in *Scales*, honor Congress's express directive that the statute not be "construed or applied" so as to violate the First Amendment, and ensure that the law did precisely what the bill's sponsor said it would: criminalize support "to the terrorist functions of terrorist groups ... while safeguarding the freedom to associate."

B. The Government's Proposed Statutory Construction Would Not Avoid the Constitutional Questions

The government proffers an alternative construction, which would interpret the statute simply to exempt "independent advocacy." Pet. 21. This construction, however, would not avoid the constitutional problems with the statute or resolve the dispute over plaintiffs' proposed speech. Pure political speech of the type in which plaintiffs seek to engage is protected not merely when it is done "independently," but also when it is done in conjunction with others.[34] Activities such as writing, speaking, and teaching do not lose their First Amendment protection when done in coordination with others. Bob Woodward, for example, does not forfeit his First Amendment rights because he writes under the direction of his Washington Post editors. Nor did Communist Party members lose their First Amendment protections because they protested and demonstrated at the direction of a foreign-dominated organization. *See supra*, note 30 (citing cases).

---

[33] 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch) (emphasis added) (quoted in *HLP II*, 352 F.3d at 402).

[34] *See Dale*, 530 U.S. at 647 ("'[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a

To protect political speech only when it is undertaken "independently" would strike at the core of political speech, which almost necessarily involves associational expression. The government's notion of "independent advocacy" would not seem to exempt speaking *to*, or *in collaboration with*, members of the organization, as plaintiffs propose to do here. Thus, the proffered interpretation would not permit the Court to avoid plaintiffs' constitutional challenge.

Moreover, the government's proposed construction would introduce even further confusion to an already vague statute. Citizens would have to guess at whether their activities were "independent," or involved "some collaboration or other relationship between the giver and the recipient." Pet. 22. Would checking facts with a PKK official on a human rights complaint constitute a "collaboration or other relationship" warranting criminal sanctions? Virtually any effort to communicate with a designated group regarding one's advocacy could be

---

corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

viewed as forfeiting independence and entering a "collaboration or other relationship." The government's proposed "construction" would not cure the provisions' many infirmities, but would only further muddy the waters.[35]

In short, the Court can avoid the constitutional issues presented here only by adopting plaintiffs' proposed construction, much as it did in *Scales*.

CONCLUSION

For all of the above reasons, the Court should affirm the court of appeals' decision with respect to the provisions it held invalid as applied to plaintiffs' speech, and reverse the court's decision with respect to the provisions it upheld.

Dated: November 16, 2009

Respectfully submitted,

DAVID D. COLE
Counsel of Record
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW

---

[35] The government's construction also is in considerable tension with the statutory language as the government itself reads it. The government would create an exemption from the entire statute for "independent advocacy," despite the fact that Congress did not do so, but only created a more limited exemption, from the "personnel" prohibition alone, for "entirely independent" activity. 18 U.S.C. § 2339B(h). And it would exempt advocacy that, even if independent, would seemingly be "for the benefit of" a designated group, the standard the government has advanced to interpret the "service" ban.

Washington, DC 20001
(202) 662-9078

SHAYANA KADIDAL
JULES LOBEL
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South #14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow,
Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN
RUDRAKUMARAN
875 Avenue of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents (08-1498)
and Cross-Petitioners (09-89)
Humanitarian Law Project et al.

APPENDIX

APPENDIX

1. 8 U.S.C. §§ 1182(a)(3)(B)(iii) and (iv) provide as follows:

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

2. 8 U.S.C. §§ 1189(a) and (d)(2) provide in relevant part as follows:

Designation of foreign terrorist organizations

(a) Designation.

(1) In general. The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)][)] or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism[)]; and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

* * * * *

(d) Definitions. As used in this section—

* * * * *

(2) the term "national security" means the national defense, foreign relations, or economic interests of the United States;

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED

DEC 22 2009

OFFICE OF THE CLERK

(2) (10)

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL.,
CROSS-PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

5AJZCC

803

QUESTION PRESENTED

Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, expert advice or assistance, * * * [or] personnel," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization, violates the First and Fifth Amendments.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 13
Argument:
- I. The material-support statute's restrictions on providing aid to known terrorist organizations do not violate the Fifth Amendment 16
  - A. The statute's terms are sufficiently clear to provide notice to persons of ordinary intelligence 16
    - 1. Instructing the PKK and LTTE on how to engage in international political advocacy constitutes "training" 19
    - 2. Consulting with the PKK and LTTE on international law, medical care, and economic development constitutes "expert advice or assistance" 27
    - 3. Providing persons to work under the direction or control of the PKK and LTTE constitutes "personnel" 34
    - 4. Helping the PKK and LTTE appear before national and international representative bodies constitutes "services" 38
  - B. The court of appeals confused the vagueness and overbreadth doctrines 42
- II. The material-support statute's restrictions on providing aid to known terrorist organizations do not violate the First Amendment 43

Table of Contents—Continued Page

A. The statute is a regulation of conduct that only incidentally and permissibly affects expression 44

1. Section 2339B regulates conduct without regard to its expressive content 44

2. Petitioners' arguments that Section 2339B is a content-based restriction on speech are meritless 49

3. Section 2339B is narrowly tailored to advance important governmental interests 52

B. The statute is not overbroad 57

C. The statute does not infringe petitioners' right of association 59

III. The material-support statute's restrictions on providing aid do not require specific intent to further the terrorist organization's unlawful activities 62

Conclusion 67

TABLE OF AUTHORITIES

Cases:

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382 (1950) 25, 32

Board of Governors of the Fed. Reserve Sys. v. *Agnew*, 329 U.S. 441 (1947) 24

Boim v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009) 48, 56

Cases—Continued: Page

Boim v. *Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) 48

Boy Scouts of Am. v. *Dale*, 530 U.S. 640 (2000) 61

California Teachers Ass'n v. *State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) 20

Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 65

Carter v. *United States*, 530 U.S. 255 (2000) 66

Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 30

City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 37

City of L.A. v. *Alameda Books, Inc.*, 535 U.S. 425 (2002) 46

Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 31

Cohen v. *California*, 403 U.S. 15 (1971) 45

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) 45

DKT Mem'l Fund Ltd. v. *Agency for Int'l Dev.*, 887 F.2d 175 (D.C. Cir. 1989) 52

Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) 29

De Jonge v. *Oregon*, 299 U.S. 353 (1937) 60, 61

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 40

Elrod v. *Burns*, 427 U.S. 347 (1976) 61

FCC v. *Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009) 63

FCC v. *League of Women Voters*, 468 U.S. 364 (1984) . . . 49

Fisher v. *City of Berkeley*, 475 U.S. 260 (1986) 35

Gentile v. *State Bar*, 501 U.S. 1030 (1991) 23, 24

Cases—Continued: Page

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 16, 17, 25, 43

Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 39

Haig v. *Agee*, 453 U.S. 280 (1981) 57

Harris v. *United States*, 536 U.S. 545 (2002) 41

Hill v. *Colorado*, 530 U.S. 703 (2000) 18, 25, 51

Humanitarian Law Project v. *Ashcroft*:

- 532 U.S. 904 (2001) 9
- 309 F. Supp. 2d 1185 (C.D. Cal. 2004), vacated, No. 04-55871 (9th Cir. Apr. 1, 2005) 9, 10

Humanitarian Law Project v. *Gonzales*, No. 04-55871 (9th Cir. Apr. 1, 2005) 10

Humanitarian Law Project v. *Reno*:

- 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001) . . . . *passim*
- 9 F. Supp. 2d 1205 (C.D. Cal. 1998), aff'd, 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001) 8
- 9 F. Supp. 2d 1176 (C.D. Cal. 1998), aff'd, 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001) 5, 7, 8

Humanitarian Law Project v. *United States Treasury Dep't*, 578 F.3d 1133 (9th Cir. 2009) 38

James v. *United States*, 550 U.S. 192 (2007) 24

Jarecki v. *G.D. Searle & Co.*, 367 U.S. 303 (1961) 39

Keyishian v. *Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967) 60

Kumho Tire Co. v. *Carmichael*, 526 U.S. 137 (1999) 29, 32, 33

Cases—Continued: Page

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 47

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 43

McConnell v. *Federal Election Comm'n*, 540 U.S. 93 (2003) 49

McIntyre v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) 45

Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 35

Morissette v. *United States*, 342 U.S. 246 (1952) 30

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 60

NCAA v. *Smith*, 525 U.S. 459 (1999) 63

Noto v. *United States*, 367 U.S. 290 (1961) 60

Parker v. *Levy*, 417 U.S. 733 (1974) 19, 26, 34

People's Mojahedin Org. of Iran v. *Department of State*, 327 F.3d 1238 (D.C. Cir. 2003) 48

People's Mojahedin Org. of Iran v. *United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000) 5, 6, 50

Pierce v. *Underwood*, 487 U.S. 552 (1988) 21, 24

Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 17

Raley v. *Ohio*, 360 U.S. 423 (1959) 40

Regan v. *Wald*, 468 U.S. 222 (1984) 57

Reno v. *ACLU*, 521 U.S. 844 (1997) 31, 45

Scales v. *United States*, 367 U.S. 203 (1961) . . . 36, 64, 65, 66

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 62

Staples v. *United States*, 511 U.S. 600 (1994) 64

Cases—Continued: Page

Taylor v. *Louisiana*, 419 U.S. 522 (1975) 33

Third Nat'l Bank v. *Impac Ltd.*, 432 U.S. 312 (1977) 30

Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) . . . 49

United States v. *Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) 65

United States v. *Albertini*, 472 U.S. 675 (1985) 46, 52

United States v. *Alves*, 317 F. Supp. 2d 65 (D. Mass. 2004) 27

United States v. *Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2006) 58

United States v. *Awan*, 459 F. Supp. 2d 167 (E.D.N.Y. 2006) 36, 58

United States v. *Balint*, 258 U.S. 250 (1922) 64

United States v. *Bestfoods*, 524 U.S. 51 (1998) 63

United States v. *Cardiff*, 344 U.S. 174 (1952) 40

United States v. *Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002) 36

United States v. *Hammoud*, 381 F.3d 316 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1097, reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005) 48, 52, 54, 58, 59, 65

United States v. *Hescorp, Heavy Equip. Sales Corp.*, 801 F.3d 70 (2d Cir.), cert. denied, 479 U.S. 1018 (1986) 38

United States v. *Kandasamy*, No. 06 CR 616 (RJD), 2008 WL 2660610 (E.D.N.Y. July 3, 2008), aff'd, No. 08-3589-CR, 2009 WL 692113 (2d Cir. Mar. 18, 2009) 53

Cases—Continued: Page

United States v. *Kassir*, No. 04 CR 356 (JFK), 2009 WL 2913651 (S.D.N.Y. Sept. 11, 2009) 53

United States v. *Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) 36

United States v. *Marzook*, 383 F. Supp. 2d 2056 (N.D. Ill. 2005) 36, 58

United States v. *Moses*, 137 F.3d 894 (6th Cir. 1998) 27

United States v. *O'Brien*, 391 U.S. 367 (1968) 15, 49, 52, 53

United States v. *Osman*, No. 1:06-cr-00416-CCB-1 (D. Md. Oct. 31, 2008) 5

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 40

United States v. *Robel*, 389 U.S. 258 (1967) 60

United States v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) 37, 58

United States v. *Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) 36, 58

United States v. *Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008) 35, 54, 58

United States v. *Warsame*, 537 F. Supp. 2d 1005 (D. Minn. 2008) 36, 58, 65

United States v. *Williams*, 128 S. Ct. 1830 (2008) 14, 18, 24, 25, 31, 32, 36, 42, 57

United States ex rel. the Attorney General of the United States v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 41

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 18, 19, 26, 34

Cases—Continued: Page

Virginia v. *Hicks*, 539 U.S. 113 (2003) 43, 57, 58, 59

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 18, 48, 51

Wayte v. *United States*, 470 U.S. 598 (1985) 49, 53

Constitution, statutes, sentencing guidelines and rule:

U.S. Const.:

Art. I, § 8, Cl. 16 20

Amend. I .... *passim*

Amend. V 2, 13, 15, 16, 43, 62, 63

Due Process Clause 16, 62

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2

§ 301(a)(7), 110 Stat. 1214 54

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(c), 118 Stat. 3762 3

Sherman Act, 15 U.S.C. 1 (§ 1) 35

Smith Act, 18 U.S.C. 2385 65

5 U.S.C. 3323(d) 28

5 U.S.C. 4103(a) 20

5 U.S.C. App. 2(a) at 455 28

6 U.S.C. 236(e)(2)(A) 28

8 U.S.C. 1182(a)(3)(B) 3

8 U.S.C. 1182(a)(3)(B)(iv)(VI) 20

8 U.S.C. 1189(a)(1) 3, 50

8 U.S.C. 1189(c) 3, 59

8 U.S.C. 1189(d)(4) 3

10 U.S.C. 373(2) 28

Statutes, sentencing guidelines and rule—Continued:

12 U.S.C. 1828(*l*) 23

15 U.S.C. 3116 20

18 U.S.C. 175b(d)(2)(G) 35

18 U.S.C. 225(a)(1) 35

18 U.S.C. 951(d) 35

18 U.S.C. 1169(b)(1) 35

18 U.S.C. 1960(a) 35

18 U.S.C. 2339A 46, 64

18 U.S.C. 2339A(a) 64

18 U.S.C. 2339A(b)(1) . . . . 4, 13, 17 , 20, 32, 39, 46, 51

18 U.S.C. 2339A(b)(2) 4, 21

18 U.S.C. 2339A(b)(3) 4, 11, 29, 31, 32

18 U.S.C. 2339B . . . . *passim*

18 U.S.C. 2339B(a) 10

18 U.S.C. 2339B(a)(1) 3, 4, 13, 22, 32, 39, 64

18 U.S.C. 2339B(h) 4, 12, 35, 36, 37, 38

18 U.S.C. 2339C 64

18 U.S.C. 2339C(a)(1) 64

18 U.S.C. 3509(b)(1)(B)(ii) 27

20 U.S.C. 954a(b) 20

22 U.S.C. 2770a(a) 20

22 U.S.C. 7423(e) 20

22 U.S.C. 7432(12) 20

22 U.S.C. 7611(b)(3)(A) 23

25 U.S.C. 2218(g) 23

42 U.S.C. 6864a(b)(3) 28

42 U.S.C. 9840a 20

Statutes, sentencing guidelines and rule—Continued:

42 U.S.C. 15025 20
47 U.S.C. 504(a) 23
United States Sentencing Guidelines:
  § 3B1.3 22
  § 3B1.3, comment. (n.4) 22
Fed. R. Evid. 702 .... 11, 29, 33

Miscellaneous:

H.R. Rep. No. 383, 104th Cong., 1st Sess. (1995) 54, 55, 59, 60
Merriam-Webster's Collegiate Dictionary (11th ed. 2005) 19, 27
The American Heritage Dictionary of the English Language:
  (3d ed. 1992) 27
  (4th ed. 2006) 19, 27
The Random House Dictionary of the English Language (2d ed. 1987) 20, 27
United States Court of Appeals for the Ninth Circuit, *Media for Case: Humanitarian Law Pro v. Gonzales, No. 02-55082* (Dec. 14, 2004) <http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506> 24, 25, 26, 37, 57
Webster's Third New International Dictionary of the English Language (1993) ... 19, 22, 27, 31, 34, 38, 40

In the Supreme Court of the United States

No. 08-1498

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

No. 09-89

HUMANITARIAN LAW PROJECT, ET AL.,
CROSS-PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (Pet. App. 33a-76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1205, and 9 F. Supp. 2d 1176.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (Pet. App. 2a-3a). On March 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 5, 2009. On April 22, 2009, Justice Kennedy further extended the time to June 4, 2009, and the petition in No. 08-1498 was filed on that date. A conditional cross-petition for a writ of certiorari was filed on July 6, 2009 (Monday). The petitions for writs of certiorari were granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. This case involves a constitutional challenge to provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that serve as crucial tools in America's fight against terrorism. The statute authorizes the Secretary of State, in consultation with the Secretary of the Trea-

sury and the Attorney General, to designate an entity as a "foreign terrorist organization" if she finds (1) that "the organization is a foreign organization"; (2) that "the organization engages in terrorist activity," as defined in 8 U.S.C. 1182(a)(3)(B); and (3) that the organization's terrorist activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1) and (d)(4). An organization may seek judicial review of its designation by filing a petition for review in the District of Columbia Circuit. 8 U.S.C. 1189(c).

It is a criminal offense for any person within the United States or subject to its jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. 2339B(a)(1). The statute defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

Ibid.

In the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(c), 118 Stat. 3762, Congress clarified several provisions of Section 2339B. In particular, IRTPA specified that in order to "knowingly" violate the material-support statute, a person "must have knowledge that the organization is a designated terrorist organization" or "that the organization has engaged or engages in terrorist activity." 18 U.S.C. 2339B(a)(1). Section 2339B thus prohibits a person with such knowledge from providing material support or resources to a designated terrorist organization.

IRTPA also amended the definition of "material support and resources" in four ways. First, it included an additional ban on the knowing provision of any "service" to a designated terrorist organization. 18 U.S.C. 2339A(b)(1). Second, it defined the term "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Third, it defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). Fourth, it placed strict limits on prosecutions based on providing "personnel":

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. 2339B(h).

Since 2001, the United States has charged approximately 150 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and to date approximately 75 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance, "personnel," or "service" to terrorist organizations. See, *e.g.*, [Superseding] Indictment at 4-5, *United States* v. *Iqbal*, No. 1:06-cr-01054 (S.D.N.Y. filed June 20, 2007) (defendants were charged under Section 2339B with providing satellite-television services to Hizballah; defendants pleaded guilty); [Third Superseding] Indictment at 1-2, *United States* v. *Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (No. 1:05-cr-00673) (defendants were charged under Section 2339B with providing al Qaeda "martial arts training and instruction"; one defendant pleaded guilty and the other was found guilty after a jury trial). Some of those cases have involved the provision of material support to one of the terrorist organizations at issue here. See, *e.g.*, *United States* v. *Osman*, No. 1:06-cr-00416-CCB-1 (D. Md. Oct. 31, 2008); *United States* v. *Sarachandran*, No. 1:06-cr-00615-RJD-1 (E.D.N.Y. guilty plea entered Jan. 26, 2009); *United States* v. *Thavaraja*, No. 1:06-cr-00616-RJD-JO-1 (E.D.N.Y. guilty plea entered June 9, 2009).

2. The Secretary of State has designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (Tamil Tigers or LTTE) as foreign terrorist organizations. The PKK has never sought judicial review of its designation. See *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998). The LTTE sought judicial review, but the District of Columbia Circuit upheld its designation. See *People's Mojahedin Org. of Iran* v. *United States Dep't of State*,

182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).

a. The PKK was founded in 1974 for the purpose of establishing an independent Kurdish state in southeastern Turkey. Since its inception, the organization has waged a violent insurgency that has claimed over 22,000 lives. In the 1990s, the PKK conducted terrorist attacks on Turkish targets throughout Western Europe; it also targeted areas of Turkey frequented by tourists. For instance, in 1996, PKK members hijacked a bus in Turkey and kidnapped two passengers, one of whom was a United States citizen. Earlier, the PKK claimed responsibility for a series of bombings in Istanbul that killed two people and wounded at least ten others, including a United States citizen. In 1993, the PKK firebombed five sites in London. In a separate incident that year, it kidnapped tourists from the United States and New Zealand and held them hostage. J.A. 128-130.

b. The Tamil Tigers were founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. J.A. 130. The organization has used suicide bombings and political assassinations in its campaign for independence, killing hundreds of civilians in the process. J.A. 130-133; see *People's Mojahedin Org. of Iran*, 182 F.3d at 19-20. In 1996, the Tamil Tigers exploded a truck bomb at the Central Bank in Colombo, Sri Lanka, killing 100 people and injuring more than 1400. J.A. 131. The following year, the group exploded another truck bomb near the World Trade Center in central Colombo, injuring 100 people, including 7 United States citizens. J.A. 130-131. In 1998, a Tamil Tiger suicide bomber exploded a car bomb in Maradana, Sri Lanka, killing 37 people and injuring more than 238 others. J.A. 130. In addition, throughout the 1990s, the Tamil Tigers carried out several attacks on Sri Lankan government officials, killing the President, the Security Minister, and the Deputy Defense Minister. J.A. 132.

3. Petitioners are two United States citizens and five domestic organizations who wish to provide support for what they say are lawful, nonviolent activities of the PKK and the Tamil Tigers.[1] Petitioners brought two separate actions, eventually consolidated in the district court, challenging the constitutionality of the material-support statute.

a. In the first action, petitioners raised several constitutional challenges, including that the material-support statute impermissibly violates their First Amendment association rights. The district court rejected that claim, noting that the statute does not directly target First Amendment interests because a terrorist designation is "not founded on the political viewpoints or subject matter that the organizations promote. Rather, the designation is based on whether the organization engages in terrorist activity." *Humanitarian Law Project*, 9 F. Supp. 2d at 1191. "More importantly," the court held, the material-support statute "does not criminalize *mere* association with designated terrorist organizations" and "does not prevent [petitioners] from affiliating with or advocating on behalf of the PKK or LTTE." *Id.* at 1191-1192.

---

[1] On September 30, 2009, the Court granted two petitions for a writ of certiorari. In No. 08-1498, the governmental parties are the petitioners, and the private parties (who were plaintiffs in the district court) are the respondents. In No. 09-89, the same private parties are the conditional cross-petitioners, and the governmental parties are the respondents. On November 2, 2009, the Court granted the parties' joint motion to amend the briefing schedule, which provided that the private parties would proceed as the petitioners and the governmental parties would proceed as the respondents in both cases.

The district court also rejected petitioners' argument that the statute violates their First Amendment speech rights. The court began by stating that it would apply intermediate scrutiny to the material-support statute because its "restrictions are content-neutral and are directed at the noncommunicative elements of [petitioners'] actions." *Humanitarian Law Project*, 9 F. Supp. 2d at 1192. The statute survives that scrutiny, the court concluded, because it is within the constitutional power of the federal government to enact; it furthers an important and substantial government interest (protecting national security); it is "not directed at suppressing [petitioners'] political speech or advocacy of the PKK's and LTTE's political agenda," but instead is "aimed at precluding material support to terrorist organizations that divert funds raised for political and humanitarian resources to their terrorist activities"; and it "restricts [petitioners'] First Amendment freedoms no more than is essential." *Id.* at 1192-1195.

The district court, however, agreed with petitioners that the terms "training" and "personnel," as they were then defined in the statute, were unconstitutionally vague. *Humanitarian Law Project*, 9 F. Supp. 2d at 1203. On the basis of that holding, the court entered a preliminary injunction prohibiting the government from enforcing the terms "training" or "personnel" against petitioners or their members. *Id.* at 1204-1205; *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1205, 1215 (C.D. Cal. 1998). The court of appeals affirmed the preliminary injunction on the same ground. *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1137-1138 (9th Cir. 2000). This Court denied interlocutory review of petitioners' First Amendment claims. *Humanitarian Law Project* v. *Ashcroft*, 532 U.S. 904 (2001).

On remand, after both parties filed dispositive motions, the district court permanently enjoined enforcement of the terms "training" and "personnel" against petitioners, again on vagueness grounds. No. CV-98-1971 ABC, 2001 WL 36105333. A panel of the court of appeals affirmed that judgment as well. 352 F.3d 382. After the IRTPA amendments became law, however, the court granted the government's petition for rehearing en banc, vacated the panel's judgment insofar as it had found the terms "training" and "personnel" unconstitutionally vague, and remanded to the district court to consider the case in light of those amendments. 393 F.3d 902. The en banc court affirmed the district court's final judgment insofar as it had rejected petitioners' other First Amendment challenges. *Ibid.*; see 352 F.3d at 393.

b. In the second action, petitioners focused on the term "expert advice or assistance," asserting that it too violates their associational rights and is overbroad and vague. The district court rejected petitioners' attempt to relitigate their associational claim. *Humanitarian Law Project* v. *Ashcroft*, 309 F. Supp. 2d 1185, 1203 (C.D. Cal. 2004). The court also rejected their argument that the term "expert advice or assistance" is overbroad, explaining that the statute "is aimed at furthering a legitimate state interest" and that petitioners had "failed to demonstrate" that its "application to protected speech is 'substantial' both in an absolute sense and relative to the scope of the law's plainly legitimate applications." *Id.* at 1202-1203. But the court agreed with petitioners that the term is vague. *Id.* at 1198-1201. It therefore enjoined the government from enforcing the challenged provision against petitioners for any assistance to the PKK and the LTTE. *Id.* at 1204. The court of appeals subsequently vacated and remanded that judgment for consideration of the IRTPA amendments. *Humanitarian Law Project* v. *Gonzales*, No. 04-55871 (9th Cir. Apr. 1, 2005).

c. Both remanded cases were consolidated before the district court, where petitioners asserted that the terms "training," "expert advice or assistance," and "personnel" are unconstitutionally vague, even as amended and clarified by IRTPA. Petitioners also argued that the term "service"—which IRTPA had added to the definition of "material support or resources"—is impermissibly vague. The district court agreed with those claims, except as to "personnel" and "expert advice or assistance" in the form of "scientific [or] technical . . . knowledge." Pet. App. 62a-69a & n.23. The court again enjoined the government from enforcing the challenged provisions against petitioners for support given to the PKK and the LTTE. *Id.* at 75a.

4. The court of appeals affirmed. Pet. App. 1a-32a.

As a threshold matter, the court of appeals agreed that "there is no Fifth Amendment due process violation." Pet. App. 19a. The court explained that in enacting IRTPA, "Congress could have, but chose not to, impose a requirement that the defendant act with the specific intent to further the terrorist activity of [a designated] organization." *Id.* at 18a. Rather, Congress required only "knowledge that the donee organization is a designated foreign terrorist organization" or "knowledge that the organization is or has engaged in terrorist activities or terrorism." *Id.* at 15a-16a (citing 18 U.S.C. 2339B(a); emphasis omitted). The court concluded that "acting with 'knowledge' satisfies the requirement of 'personal guilt' and eliminates any due process concerns." *Id.* at 17a.

Turning to petitioners' vagueness challenge, the court of appeals held that the term "training" is unconstitutionally vague. Pet. App. 20a-23a. The court considered it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for [humanitarian] aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. In addition, "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" the court stated that "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a. The court concluded that the term "training" is vague "because it 'implicates, and potentially chills, [petitioners'] protected expressive activities.'" *Id.* at 22a-23a (quoting *id.* at 64a).

The court of appeals also held that the term "expert advice or assistance" is unconstitutionally vague. Pet. App. 23a-24a. The court noted that the statute's definition of "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), was borrowed from Federal Rule of Evidence 702. But that borrowing, the court stated, "does not clarify the term 'expert advice or assistance' for the average person with no background in law." Pet. App. 24a (quoting *id.* at 66a). In particular, the court concluded that "the 'other specialized knowledge' portion of the ban" would "cover constitutionally protected advocacy." *Ibid.* By contrast, the court held that the provision was not vague insofar as it reached "scientific [or] technical * * * knowledge," because "the meaning of 'technical' and 'scientific' is reasonably understandable to a person of ordinary intelligence." *Ibid.* (quoting *id.* at 66a).

Similarly, the court of appeals held that the term "service" is unconstitutionally vague. Pet. App. 25a. According to the court, "each of the other challenged provisions could be construed as a provision of 'service.'" *Ibid.* For instance, the court stated, "[t]he term 'service' presumably includes providing members of PKK and LTTE with 'expert advice or assistance' on how to lobby or petition representative bodies such as the United Nations" and includes "'training' members of PKK or LTTE on how to use humanitarian and international law to peacefully resolve ongoing disputes." *Ibid.* The court also concluded that "it is easy to imagine protected expression that falls within the bounds" of that term. *Ibid.* (quoting *id.* at 67a).

The court of appeals held, however, that the term "personnel" is not vague. Pet. App. 26a-27a. The court noted that, as a result of IRTPA, the statute "criminalizes providing 'personnel' to a foreign terrorist organization only where a person, alone or with others, '[work]s under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization.'" *Id.* at 26a (brackets in original) (quoting 18 U.S.C. 2339B(h)). As amended, the court held, the term is not vague because it "no longer criminalizes pure speech protected by the First Amendment." *Id.* at 26a-27a.

Finally, the court of appeals rejected petitioners' claim that the material-support statute is overbroad. Pet. App. 27a-29a. The court noted that because the statute is "aimed * * * at stopping aid to terrorist groups," and "is not aimed primarily at speech, an overbreadth challenge is more difficult to show." *Id.* at 28a. Moreover, the court found that the statute's "ban on provision of 'material support or resources' to designated foreign terrorist organizations undoubtably has many legitimate applications," such as criminalizing the provision of "income, weapons, or expertise in constructing explosive devices." *Ibid.* "[A]lthough [petitioners] may be able to identify particular instances of protected speech that may fall within the statute," the court concluded, "those instances are not substantial when compared to the legitimate applications of [S]ection 2339B(a)." *Id.* at 29a.

SUMMARY OF ARGUMENT

1. A. The material-support statute is not void for vagueness under the Fifth Amendment. As a threshold matter, the statute requires that a person "knowingly provide[] material support or resources to a foreign terrorist organization." 18 U.S.C. 2339B(a)(1). A defendant therefore must know that the recipient of his proffered aid has been designated as a terrorist organization or engages in terrorist activity. That express scienter requirement diminishes any vagueness concerns. Moreover, a defendant must direct his aid to a foreign terrorist organization. The statute does not prohibit independent advocacy or expression of any kind. What it prohibits is the separate act of rendering assistance to foreign terrorists, whether that assistance takes the form of money or other property or a "service" such as "training," "expert advice or assistance," or "personnel." 18 U.S.C. 2339A(b)(1).

The challenged terms rest on simple distinctions that are readily understood by persons of ordinary intelligence. The term "training" is defined as imparting a specific skill rather than general knowledge, and the term "expert advice or assistance" is similarly defined as imparting scientific, technical, or specialized knowledge. Ordinary individuals understand the difference between what is commonly known and what is not. The term "personnel" is defined as persons who either supervise or work under the direction or control of a foreign terrorist organization, and the term "service" refers to action taken for the direct benefit of a foreign terrorist organization. Again, ordinary citizens understand the difference inherent in these definitions between concerted and independent action.

The statute is not vague simply because application of these terms to particular actions may sometimes be difficult. Vagueness lies not in occasional uncertainty about whether an incriminating fact has been proved, but in fundamental indeterminacy about what that fact is. See *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008). For that reason, courts have routinely upheld the challenged terms, which appear in thousands of statutes throughout the United States Code, as sufficiently clear to provide fair notice of what conduct the law prohibits. Moreover, petitioners challenge the statute only as applied to their own conduct, all of which falls squarely within any interpretation of the terms "training," "expert advice or assistance," "personnel," or "service." Application of the statute to petitioners' proposed activities thus presents no constitutional difficulties. Indeed, petitioners have consistently used those very terms to describe their proposed activities.

B. The court of appeals enjoined enforcement of the terms "training," "expert advice or assistance," and "service" because, in its view, those terms could be read to encompass independent advocacy. But the material-support statute is not reasonably read to cover—and in the face of any constitutional doubt should not be read to cover—independent advocacy. In any event, suppressing such advocacy would make the statute unconstitutional as applied, not vague. The court of appeals erred by conflating petitioners' overbreadth claim under the First Amendment with their vagueness claim under the Fifth Amendment.

II. The material-support statute does not violate the First Amendment. Contrary to petitioners' claims, the statute is a regulation of conduct, only incidentally affecting speech and applying irrespective of any expressive content; it is therefore subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). The statute easily survives such scrutiny because it is narrowly tailored to advance important governmental interests unrelated to the suppression of petitioners' expression. Nor is the statute substantially overbroad: the vast bulk of the statute's applications, involving such matters as the provision of money and weapons to terrorist organizations, are not even arguably problematic. Finally, the statute does not infringe associational rights, because it does not prevent petitioners from joining or otherwise associating with foreign terrorist organizations. For those reasons, the lower courts, including the courts below, have uniformly upheld the statute against First Amendment challenge.

III. Petitioners argue that, as a matter of constitutional avoidance, the material-support statute should be interpreted to require specific intent to further a terrorist organization's unlawful activities. That argument is waived, futile, and incorrect. Petitioners raise their current avoidance argument for the first time before this Court; construing the statute to require specific intent would not avoid resolution of petitioners' constitutional claims; and Congress expressly rejected such a specific-intent requirement.

ARGUMENT

Petitioners raise a host of challenges to the material-support statute. They contend that the statute is unconstitutional under the Fifth Amendment because it is overly vague (Br. 25-42) and under the First Amendment because it impermissibly discriminates on the basis of content (Br. 43-55), because it is overbroad (Br. 42-43), and because it violates their right to associate with designated terrorist organizations (Br. 56-59). The court of appeals correctly rejected petitioners' arguments regarding content-based discrimination, overbreadth, and associational rights, but erred in partially accepting petitioners' due process challenge. The material-support statute provides persons of ordinary intelligence with reasonably clear, and therefore constitutionally sufficient, notice of the types of direct aid that it prohibits. The court of appeals thus erred by partially invalidating one of this nation's most valuable and vital tools in the fight against international terrorism.

I. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

A. The Statute's Terms Are Sufficiently Clear To Provide Notice To Persons Of Ordinary Intelligence

The Fifth Amendment's Due Process Clause requires that a criminal statute be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Clause does not require that an offense be defined with "mathematical certainty," *id.* at 110, but only that it give "relatively clear guidelines as to prohibited conduct," *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994). The statutory definition of "material support" in 18 U.S.C. 2339A(b)(1) readily satisfies that standard.

As a threshold matter, this Court should apply the vagueness standard that it typically uses in cases involving the application of statutes defining criminal offenses. Petitioners at times appear to argue otherwise, contending that the material-support statute is "subject to the most stringent vagueness scrutiny" in part because it "trench[es] on speech and associational rights." Br. 25-26. But this Court has never suggested that a statute aimed at regulating conduct regardless of its expressive content—*i.e.*, the provision of aid to terrorist organizations—triggers a heightened need for legislative precision, just because it incidentally captures some expressive activity. As discussed further in Part II.A, the material-support statute is not targeted at speech, still less at any particular message, and petitioners may accordingly express any views they wish about the PKK, LTTE, or any other terrorist organization. The statute simply prevents petitioners from contributing resources of various kinds that further those groups' activities. Such a prohibition is not subject to any special vagueness standard.

Petitioners' request for heightened scrutiny is particularly inappropriate in this context, because Congress crafted the statute to minimize even incidental interference with First Amendment freedoms. For example, Congress included a scienter requirement, which serves to "mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); see *id.* at 499 n.14 (citing cases). As the court of appeals explained, the statute at issue requires "that the donor defendant provided 'material support or resources' * * * with *knowledge* that the donee organization is a designated foreign terrorist organization, or with *knowledge* that the organization is or has engaged in terrorist activities or terrorism." Pet. App. 15a-16a. That scienter requirement helps to remove any potential vagueness problem by preventing application of the statute to innocent conduct, including any with an expressive component.

In any event, the material-support statute meets even the vagueness standard that the Court has employed in cases involving speech restrictions. This Court has repeatedly observed that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989); see *Williams*, 128 S. Ct. at 1845; *Hill* v. *Colorado*, 530 U.S. 703, 740 (2000) (Souter, J., concurring). Petitioners here identify four components of the definition of material support that they consider impermissibly vague: "training," "expert advice or assistance," "personnel," and "service." In fact, each of those terms is sufficiently clear to give persons of ordinary intelligence fair notice of what the statute prohibits.

Still more importantly, there is no difficulty in applying the material-support statute to the facts of this case. Petitioners here do not challenge the statute on its face. Rather, they claim that, "as applied to their proposed speech, the challenged provisions are intolerably vague." Br. 4; *id.* at 25 ("The provisions are vague as applied to plaintiffs' intended speech.") (emphasis omitted). Accordingly, the court of appeals addressed only an as-applied vagueness challenge, see Pet. App. 22a n.6, and that is the only challenge before this Court. Petitioners' claim thus depends on whether ordinary persons would understand how the statute applies not to petitioners' fanciful hypotheticals, but to their own proposed conduct. See *Village of Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). And in fact all of petitioners' proposed activities fall squarely within the ordinary meaning of the statute's terms. The clarity of the statute as applied in this case is fatal to petitioners' claim of vagueness.

1. Instructing the PKK and LTTE on how to engage in international political advocacy constitutes "training"

a. Even before Congress clarified the definition of "training" by enacting IRTPA in 2004, the meaning of that term was clear and readily intelligible to the average person. "Train" is defined as "to teach or exercise (someone) in an art, profession, trade, or occupation," to "direct in attaining a skill," or to "give instruction to." *Webster's Third New International Dictionary of the English Language* 2424 (1993) (*Webster's*); see *The American Heritage Dictionary of the English Language* 1830 (4th ed. 2006) (*American Heritage*) (defining "train" as "[t]o make proficient with specialized instruction and practice"); *Merriam-Webster's Collegiate Dictionary* 1326 (11th ed. 2005) (*Merriam-Webster's*) (defining "train" as "to form by instruction, discipline, or drill" or "to teach so as to make fit, qualified, or proficient"); *The Random House Dictionary of the English Language* 2007 (2d ed. 1987) (*Random House*) (defining "train" as "to make proficient by instruction and practice, as in some art, profession, or work").

As courts have recognized, an ordinary person would readily understand those concepts. See *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (holding that "instruction" is a "word[] of common understanding" and is not unconstitutionally vague). Indeed, a host of federal statutes use the term "training" in a similar manner to Section 2339A(b)(1).[2] Despite the thousands of references to the term "training" in the United States Code, petitioners do not point to any authority for the proposition that terms like "training," "instruction," or "teaching" are impermissibly vague.

---

[2] See 8 U.S.C. 1182(a)(3)(B)(iv)(VI) (prohibiting aliens from providing material support, including "training," to terrorists); 22 U.S.C. 7423(e) and 7432(12) (prohibiting any federal, state, or local governmental agency or entity from providing support, including "the training or detail of personnel," to the International Criminal Court); see also 5 U.S.C. 4103(a) (requiring federal agencies to establish plans "for the training of employees"); 15 U.S.C. 3116 (requiring the Secretary of Labor to "assure the availability of counseling, training, and other support activities" for the unemployed); 20 U.S.C. 954a(b) (authorizing the National Endowment for the Arts in various ways "to support the education, training, and development of this Nation's artists"); 22 U.S.C. 2770a(a) (providing that "the President may provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization"); 42 U.S.C. 9840a (providing for "ongoing training and technical assistance" to Early Head Start agencies); 42 U.S.C. 15025 (providing that federal assistance to designated state agencies "may support and conduct training for persons who are individuals with developmental disabilities"). The term "training" even appears in the United States Constitution, which reserves to the States "the Authority of training the Militia according to the discipline prescribed by Congress." Art. I, § 8, Cl. 16.

In fact, petitioners' own statements belie their argument. The term "training" is sufficiently intelligible that petitioners repeatedly use it to describe their proposed activities. See Br. 10 ("Prior to AEDPA's enactment, the HLP and Judge Fertig had been assisting the PKK by training them in how to bring human rights complaints to the United Nations."); J.A. 81 (original complaint; alleging that HLP and Judge Fertig "would like to * * * provide the PKK and the Kurds with training * * * on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations"); J.A. 58-59 (amended complaint; same). As petitioners' statements demonstrate, average persons understand that instructing groups like PKK and the LTTE on "how to engage in political advocacy" and "how to use international law to seek redress for human rights violations" falls within the commonly accepted meaning of the term "training."

b. Even if the term "training" were not sufficiently intelligible standing alone, Congress further defined that term in IRTPA to include "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Contrary to the court of appeals' conclusion, Pet. App. 21a-22a, that definition is clear on its face: a person of ordinary intelligence is capable of distinguishing between what is commonly or generally known and what is not. See *Pierce v. Underwood*, 487 U.S. 552, 572 (1988) (distinguishing "some distinctive knowledge or specialized [litigation] skill" from "general lawyerly knowledge").[3]

Moreover, the material-support statute only prohibits imparting a specific skill "*to* a foreign terrorist organization." 18 U.S.C. 2339B(a)(1) (emphasis added). The statute thus prohibits support that is channeled to a foreign terrorist organization, and excludes all advocacy or expression that occurs independently of such an organization. See *Webster's* 2401 (defining "to" as "a function word to indicate movement * * * toward * * * a place, person, or thing that is reached"). Indeed, that limitation is inherent in the notion of "training" itself. See *id.* at 2424 (defining "train" as "to teach or exercise *(someone)* in an art, profession, trade, or occupation") (emphasis added). Petitioners themselves recognize that limitation. See Br. 46 ("Here, the statute flatly bans certain kinds of speech *to* designated organizations, *e.g.*, training of or advising their members."). Accordingly, a defendant provides "training" within the meaning of the material-support statute only if he endeavors to impart a specific skill to people whom he knows to be members of a foreign terrorist organization.[4]

---

[3] The Sentencing Guidelines make a similar distinction between specialized and general skills. All criminal defendants, not simply those convicted pursuant to the material-support statute, are subject to a two-level increase in their offense level if they "use[] a special skill, in a manner that significantly facilitate[s] the commission or concealment of the offense." Sentencing Guidelines § 3B1.3. A "special skill" is defined, in turn, as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." *Id.* § 3B1.3, comment. (n.4).

[4] Petitioners quote (Br. 28) portions of a colloquy with the government's counsel before the district court. In context, the government explained, as it has throughout this litigation, that the material-support

Petitioners argue that the distinction between general knowledge and specific skills is "inescapabl[y] vague[]." Br. 27. The sole legal support that petitioners advance for that proposition is *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), in which this Court found impermissibly vague a state ethical rule limiting an attorney, in his communications to the public, to stating "without elaboration . . . the general nature of the . . . defense," *id.* at 1048. Petitioners' argument would suggest that any federal statute distinguishing between the general and the specific is subject to a possible vagueness challenge. See, *e.g.*, 12 U.S.C. 1828(*l*) (referring to "general or specific regulation"); 22 U.S.C. 7611(b)(3)(A) (same; "general and specific" objectives); 25 U.S.C. 2218(g) (same; "any general or specific statute"); 47 U.S.C. 504(a) (same; "other general or specific penalties"). But that proposition cannot be correct, and indeed *Gentile* is different from this case in two critical respects.

First, *Gentile* arose from regulation of "classic political speech," at "the very center of the First Amendment." 501 U.S. at 1034. By contrast, this case involves a generally applicable, content-neutral regulation of conduct. See pp. 44-48, *infra*. Second, and even more important, the state ethics rule in *Gentile* employed terms (*e.g.*, "general nature" and "elaboration") with "no settled usage or tradition of interpretation" in the particular context. 501 U.S. at 1048-1049. The rule thus required "wholly subjective judgments" about when at-

---

statute requires action taken "at the behest [of]" or "at the direction and control" of a terrorist organization. C.A. Supp. E.R. 217; *id.* at 221 ("Training is a matter of are you providing it to a foreign terrorist organization or not."); *id.* at 224-225. The statute prohibits only activity taken in concert with a terrorist organization.

torneys had said too much—judgments that could not be guided by "statutory definitions, narrowing context, or settled legal meanings." *Williams*, 128 S. Ct. at 1846.

By contrast, in this context the distinction between "a specific skill" and "general knowledge" has a settled usage, see *Pierce*, 487 U.S. at 572, as well as a legal analogue in the sentencing context, see p. 22 n.3, *supra*. The statute uses a "term[] of degree," *Gentile*, 501 U.S. at 1049, but in a way and in a context that supplies guidance in determining what that term means. Cf. *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007) (holding that the term "serious potential risk" is not impermissibly vague); *Board of Governors of the Fed. Reserve Sys.* v. *Agnew*, 329 U.S. 441, 449 (1947) (same; "substantiality"). Moreover, the ethics rule in *Gentile* lacked any scienter requirement, and therefore failed to screen out defendants who could not discern the lawfulness of their statements even after "a conscious effort at compliance." 501 U.S. at 1051. Here, there is little danger that a defendant will inadvertently train foreign terrorists in specific skills.[5]

---

[5] Petitioners posit (Br. 27-28) a hypothetical course in geoscience or geopolitics offered to members of the PKK or LTTE. The hypothetical is drawn from a colloquy with the government's counsel at oral argument before the en banc court of appeals. Counsel correctly explained that, as amended, the material-support statute prohibits instructing members of terrorist organizations in specific scientific or political skills. See United States Court of Appeals for the Ninth Circuit, *Media for Case: Humanitarian Law Pro v. Gonzales, No. 02-55082* (Dec. 14, 2004) <http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506> (50:40-51:20). Geoscience and geopolitics are types of specialized knowledge not held by members of the general public, and instruction in them requires substantial education or training. As counsel further explained, the ability to hypothesize cases that test the boun-

Of course, there may be hard cases in which people can reasonably debate whether a particular type of instruction imparts a specific skill, but that occasional difficulty does not render the statute vague. This Court has repeatedly observed that "[c]lose cases can be imagined under virtually any statute," and "the mere fact that close cases can be envisioned" does not indicate that a statute is unconstitutionally vague. *Williams*, 128 S. Ct. at 1846; *Hill*, 530 U.S. at 733 ("[T]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question.") (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)). Determining whether a defendant's instruction imparted a specific skill is no more difficult, as a factual matter, than determining whether a defendant believed or intended others to believe that material was child pornography, *Williams*, 128 S. Ct. at 1846, or determining whether a defendant made a noise or diversion that tended to disturb the peace or good order of a school, *Grayned*, 408 U.S. at 110-111. The point for vagueness purposes is that an ordinary person would understand what it means to instruct terrorist organizations in a specific skill.

c. Still more critically, an ordinary person would understand how this provision of the material-support statute applies to the particular facts of this case. Petitioners seek to "provide the PKK and the Kurds with training and written publications on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations." J.A. 59. Teaching the PKK and LTTE "how to

---

dary between general and specialized knowledge does not render the statute vague. *Ibid.* (51:50-52:22, 54:23-54:44).

petition for relief before representative bodies like the United Nations," Pet. App. 35a, is designed to impart a specific skill: a person of ordinary intelligence would understand that the skill of international political advocacy requires more than general knowledge. As evidence of that common understanding, at oral argument before the en banc court of appeals, petitioners' counsel twice referred to the "human rights advocacy training" that petitioners hope to provide, see United States Court of Appeals for the Ninth Circuit, *Media for Case: Humanitarian Law Pro v. Gonzales, No. 02-55082* (Dec. 14, 2004) <http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506> (*Media for Case*) (8:45, 9:57), making clear that such instruction concerns a specialized subject matter and skill set.

Indeed, at every opportunity throughout this litigation, petitioners have represented that they want to instruct the PKK and LTTE not on abstract or academic subjects but on a specific skill: how to petition international bodies like the United Nations more effectively. Petitioners may not believe such activity to be harmful, but they must understand, as all reasonable observers would, that the activity is covered by the statute's terms. Petitioners' proposed activity falls within the category of aid to terrorist organizations that Congress sought to prohibit. Because the material-support statute is clear as applied to petitioners' intended activities, the Court need not consider whether the statute might be vague as applied to others' hypothetical activities. See *Village of Hoffman Estates*, 455 U.S. at 495; *Levy*, 417 U.S. at 756. The clarity of the statute as applied to petitioners' own conduct is fatal to their claim of vagueness.

2. *Consulting with the PKK and LTTE on international law, medical care, and economic development constitutes "expert advice or assistance"*

a. Petitioners also contend (Br. 29-33) that the phrase "expert advice or assistance" is unconstitutionally vague. They do not dispute that they want to provide "advice or assistance" to the PKK and LTTE. Rather, they claim that they are "force[d] * * * to guess whether any aspect of their advice" is expert in nature. Br. 29. But the term "expert" has a clearly understood meaning to the average person, referring to special skills or knowledge. See *Webster's* 800 (defining "expert" as "having special skill or knowledge derived from training or experience"); *Merriam-Webster's* 440 (same); see also *American Heritage* 625 (defining "expert" as "[h]aving, involving, or demonstrating great skill, dexterity, or knowledge as the result of experience or training"); *Random House* 681 (defining "expert" as "possessing special skill or knowledge; trained by practice; skillful or skilled").

For that reason, courts have never had any difficulty in determining the ordinary meaning of the term "expert." See, *e.g.*, *United States* v. *Moses*, 137 F.3d 894, 899 (6th Cir. 1998) (construing the term "expert testimony" in 18 U.S.C. 3509(b)(1)(B)(ii) to mean testimony by a "person with a high degree of skill or knowledge of a certain subject") (quoting *The American Heritage Dictionary of the English Language* 645 (3d ed. 1992)); *United States* v. *Alves*, 317 F. Supp. 2d 65, 68 (D. Mass. 2004) (construing the term "expert or other services" to include "[t]he services of an immigration counsel"). Like the term "training," the term "expert" appears throughout the United States Code, and petitioners do not point to any authority finding the term vague in any context.[6]

Notably, petitioners again do not seem to believe their own argument. The term "expert" is sufficiently intelligible that petitioners consistently have used it to describe their past and proposed future activities. J.A. 56 ("Since 1991, the HLP and Judge Fertig have devoted a substantial amount of time and resources * * * to working with and providing training, expert advice and other forms of support to the PKK in its efforts to protect the Kurds from human rights abuses."); J.A. 60 ("The Sangam and its members wish to offer their expert medical advice and assistance * * * by consulting with the LTTE on how the health care system in Tamil Eelam can be improved."); J.A. 61 ("The WTCC and its members wish to provide expert advice and assistance to the LTTE."); J.A. 62 ("Many members of FETNA wish to provide their expert advice and assistance to the Tamils."); *ibid.* ("The THWRC and its members wish to provide expert advice and assistance to the LTTE.").

---

[6] See, *e.g.*, 5 U.S.C. 3323(d) (authorizing the Chief of Engineers of the Army to employ retired employees "whose expert assistance is needed in connection with river and harbor or flood control works"); 5 U.S.C. App. 2(a) at 455 (finding that federal advisory committees furnish "useful and beneficial * * * expert advice" to the federal government); 6 U.S.C. 236(e)(2)(A) (requiring that certain employees of the Department of Homeland Security provide types of "expert advice and training to consular officers"); 10 U.S.C. 373(2) (authorizing the Secretary of Defense to provide federal, state and local law enforcement officials with certain kinds of "expert advice"); 42 U.S.C. 6864a(b)(3) (authorizing the Secretary of Energy to provide financial assistance for "expert advice" related to energy efficiency improvements in low-income housing).

b. The clarity of "expert advice or assistance" has only been enhanced by IRTPA, which further defines it to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). That definition is taken from Federal Rule of Evidence 702, which permits expert witnesses to offer testimony based on "scientific, technical, or other specialized knowledge." This Court explained in *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), that the category of scientific, technical, and other specialized knowledge consists of "specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case"—all of which often rest on experiences "foreign in kind" to those of the population in general. *Id.* at 149 (citation omitted). Once again, an ordinary person can readily distinguish between common knowledge and specialized knowledge foreign to the experiences of most people.

The court of appeals believed that the origins of the phrase "expert advice or assistance" in Rule 702 did not clarify the statute "for the average person with no background in law." Pet. App. 24a (quoting *id.* at 66a). Similarly, petitioners argue that Rule 702 is designed for use by "trained judges," not the "general public." Br. 33. But this Court's interpretation of Rule 702 has been based on the ordinary meaning of the rule's words, not on obscure legal arcana. See *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-590 (1993) (citing dictionary definition of "knowledge"). The average person need not know anything about Rule 702 or about the relationship between Rule 702 and the phrase "expert advice or assistance" in order to understand the meaning of that term.[7]

The court's analysis is particularly puzzling because it held that part of the phrase—namely, "scientific [or] technical * * * knowledge"—is *not* vague, while the immediately following phrase "other specialized knowledge" is vague. Pet. App. 24a. But under the principle of *ejusdem generis*, "other specialized knowledge" takes its meaning from the preceding (concededly non-vague) terms "scientific" and "technical." See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Indeed, "the average person with no background in law," Pet. App. 24a (quoting *id.* at 66a), would not need to be familiar with "such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach [the] obvious conclusion" that "words grouped in a list should be given related meaning," *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322-323 & n.16 (1977) (citation omitted). An ordinary person would understand that the entire phrase —"scientific, technical or other specialized knowledge"—refers to knowledge relating to subject matter and based on experiences not usually possessed or shared by the general public.

c. Petitioners claim (Br. 29) that they cannot know whether "advice or assistance" is "derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), because "all knowledge might be thought" to do so, Br. 29. But that is an absurd reading of the statute: if Congress had intended to refer to the entirety of human knowledge, it would not have added the words "scientific, technical or other specialized knowledge." For the same reason that Congress expressly excluded general knowledge from the definition of "training," Congress required "expert advice or assistance" to be based on or drawn from a body of scientific, technical or specialized knowledge—as when, for example, a banker provides advice on laundering money or a chemist provides advice on manufacturing biological weapons. Just as an ordinary person would understand the difference between specific skills and general knowledge, see pp. 21-22, *supra*, so too he would appreciate when advice is derived from specialized rather than general knowledge.

---

[7] In any event, the court of appeals' criticism rests on a misunderstanding of the vagueness standard. Many terms used in criminal statutes, such as "malice aforethought" or "conspiracy," are not fully intelligible as a matter of ordinary English but are nevertheless enforceable because they have determinate meanings in the law. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art" with an established legal meaning, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.").

Petitioners fall back (Br. 30) on the claim that even the terms "scientific" and "technical" are vague. But nothing in this Court's precedents supports a vagueness challenge to words of this kind, whose core meanings are objective and readily understood. This Court has found vagueness in words like "annoy[ing]," *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971), or "[i]ndecent," *Reno* v. *ACLU*, 521 U.S. 844, 870-871 & n.35 (1997), because they require "wholly subjective judgments," *Williams*, 128 S. Ct. at 1846. By contrast, the use of terms like "scientific" and "technical" rests on factual determinations—*i.e.*, whether knowledge is specific, practical, and related to a particular branch of science or a profession. See *Webster's* 2348 (defining "technical" as "having special usu[ally] practical knowledge esp[ecially] of a mechanical or scientific subject"). Petitioners focus

(Br. 32) on less common, alternative definitions of the words, without explaining why Congress would have resorted to those less familiar meanings.

To be sure, "it may be difficult in some cases to determine" whether knowledge is scientific or technical, *Williams*, 128 S. Ct. at 1846, but "courts and juries every day pass upon" precisely that type of factual question, *ibid.* (quoting *Douds*, 339 U.S. at 411). Once again, the ability to devise close hypothetical cases does not render Section 2339A(b)(3)'s requirement indeterminate. Moreover, terms like "scientific" and "technical" have a settled legal meaning, see *Kumho Tire Co.*, 526 U.S. at 148-149, and Congress used them in a context that provides further indication of their scope. The definition of "material support and resources" includes "false documentation or identification, communications equipment, * * * weapons, lethal substances, [and] explosives." 18 U.S.C. 2339A(b)(1). That list demonstrates the types of "scientific" and "technical" "advice or assistance" that concerned Congress.

Petitioners argue (Br. 30) that general knowledge may once have been scientific, technical, or specialized knowledge that has since been dispersed to the public. But a term is not vague just because its coverage may change over time. No doubt the Copernican theory once rested with a handful of astronomers, whereas now is a matter of common knowledge. But that progression does not render Section 2339B(a)(1) vague, because it requires that the expert advice or assistance be derived from specialized knowledge at the time a person "knowingly provides [it] to a foreign terrorist organization." What matters is that divulging that the planets orbit the sun does not *now* count as "expert advice." Petitioners similarly argue (Br. 31) that whether knowledge is specialized depends on the level of sophistication of the recipient. But the proper test looks to the general public, not the particular recipient of the advice or assistance. Advice on encrypting communications becomes no more general because the recipients are experienced software programmers. In the analogous context of interpreting "specialized knowledge" under Rule 702, this Court has looked to whether the knowledge is foreign to the experiences of jurors, *Kumho Tire Co.*, 526 U.S. at 149, who are themselves "drawn from a fair cross section of the community," *Taylor* v. *Louisiana*, 419 U.S. 522, 527 (1975).

d. And again, critically, the term "expert advice or assistance" is not vague as applied in this case, even if it conceivably could be vague as applied in some other. Petitioners seek to advise the PKK and LTTE on "how to bring human rights complaints to the United Nations." Br. 10; see J.A. 59 (alleging that petitioners want to advise "on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations"). Petitioners also seek to "assist[]" the PKK and LTTE "in peace negotiations." Br. 10; see J.A. 59 (alleging that petitioners want to "assist PKK members at peace conferences and other meetings designed to support a peaceful resolution of the Turkish conflict"). Petitioners further seek to provide "expert medical advice and assistance," J.A. 60; "expert advice on how to improve the delivery of health care, with a special focus on the area of otolaryngology," J.A. 61; and "expert advice and assistance" "in the fields of politics, law, and economic development," *ibid.*, and "information technology," J.A. 62.

Advice in each of those subject matters requires specialized, practical knowledge that is the result of substantial education or training. A person of ordinary intelligence would understand that all of these forms of assistance require more than general knowledge. Whatever difficulties might exist at the margins of "expert advice and assistance," petitioners' proposed activities fall squarely within its core. Because the term "expert advice and assistance" clearly covers petitioners' proposed activities, their as-applied vagueness challenge must fail. *Village of Hoffman Estates*, 455 U.S. at 495; *Levy*, 417 U.S. at 756.

3. *Providing persons to work under the direction or control of the PKK and LTTE constitutes "personnel"*

a. Petitioners argue (Br. 36-38) that the term "personnel" is unconstitutionally vague. The court of appeals correctly rejected that argument. See Pet. App. 26a-27a. The meaning of the term "personnel" was clear to a person of ordinary intelligence even before IRTPA. See *Webster's* 1687 (defining "personnel" as "persons of a particular (as professional or occupational) group"). IRTPA further clarified the material-support statute, so that it now provides:

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working

> under the foreign terrorist organization's direction and control.

18 U.S.C. 2339B(h). Accordingly, conviction under that provision requires a defendant to knowingly provide one or more persons to work under or to supervise a terrorist organization. If an individual acts independently of the organization, he cannot be held liable.

A person of ordinary intelligence would easily understand the statute's distinction between concerted and independent action. See *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (discussing, in connection with Section 1 of the Sherman Act, 15 U.S.C. 1, "the basic distinction between concerted and independent action"). Just as, for instance, an ordinary person understands the difference between "concerted effort by more than one entity to fix prices or otherwise restrain trade" and "independent activity by a single entity," *Fisher* v. *City of Berkeley*, 475 U.S. 260, 266 (1986), so too he will understand the difference between acting under a foreign terrorist organization's "direction or control" and acting on his own. Indeed, the definition of "personnel" is not significantly different from terms used in other federal statutes that impose criminal liability on persons who act under another's direction or control, see, *e.g.*, 18 U.S.C. 175b(d)(2)(G); 18 U.S.C. 951(d), or on those who manage, supervise, or organize an operation or individual, see, *e.g.*, 18 U.S.C. 225(a)(1); 18 U.S.C. 1169(b)(1); 18 U.S.C. 1960(a).

For that reason, courts have held since IRTPA's enactment that the term "personnel" is not unconstitutionally vague as applied to criminal defendants' intended support to foreign terrorist organizations. See *United States* v. *Taleb-Jedi*, 566 F. Supp. 2d 157, 182 (E.D.N.Y. 2008) ("[I]t is clear that the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it also provides explicit standards for those applying it."); *United States* v. *Warsame*, 537 F. Supp. 2d 1005, 1017-1018 (D. Minn. 2008); *United States* v. *Shah*, 474 F. Supp. 2d 492, 497 (S.D.N.Y. 2007); *United States* v. *Awan*, 459 F. Supp. 2d 167, 177-181 (E.D.N.Y. 2006); *United States* v. *Marzook*, 383 F. Supp. 2d 1056, 1063-1068 (N.D. Ill. 2005); cf. *United States* v. *Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (pre-IRTPA); *United States* v. *Lindh*, 212 F. Supp. 2d 541, 574 (E.D.Va. 2002) (same).

b. Petitioners argue that "direction or control" could "mean many things of potential, but uncertain, applicability." Br. 36. But the statute is not vague simply because some cases may present a close question as to whether a person is acting independently. That question is no more than a factual issue to be resolved by the jury in a particular case. See *Williams*, 128 S. Ct. at 1846 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."); *Scales* v. *United States*, 367 U.S. 203, 223 (1961). In some cases, proof of "direction or control" will be clear; in other cases, it will not. But in no set of cases will a reasonable jury be confused as to the factual question to be determined.

Petitioners' hypotheticals (Br. 36-37) involving the provision of legal or journalistic services to foreign terrorist organizations run aground on this basic point. Whether a defendant works "under [a] terrorist organization's direction or control," 18 U.S.C 2339B(h), is necessarily a fact-dependent and context-specific question, and reasonable factfinders may disagree about the answer in a particular case. But that does not mean the question should not be assigned to such factfinders in the first instance. To the contrary, the question whether a defendant has acted under the "direction or control" of another is properly directed to a jury in a particular case, not to this Court in the guise of an as-applied vagueness challenge. The vagueness doctrine steps in only when a question is indeterminate, not when the known facts make an intelligible question difficult to answer.[8]

c. In any event, any vagueness at the margins of the term "personnel" would not help petitioners. They say that they seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * * write and distribute publications supportive of the PKK and the cause of Kurdish liberation; * * * advocate for the freedom of political prisoners in Turkey

---

[8] Petitioners point (Br. 38) to a statement by government counsel in a different case six years ago, before Congress amended the definition of "personnel." *United States* v. *Sattar*, 272 F. Supp. 2d 348, 360 (S.D.N.Y. 2003). The statement concerned the difference between joining a foreign terrorist organization and providing "personnel" to that organization. As amended by IRTPA, the latter now requires a person "to work under [the] organization's direction or control," 18 U.S.C. 2339B(h), and a person who becomes a member of an organization, without more, does not perform "work" for that organization. Even prior to the enactment of IRTPA, the government at oral argument before the en banc court of appeals disavowed its earlier statement. See *Media for Case* (38:16-38:54 mark) ("He said, 'You know it when you see it.' * * * I don't know if he thought he was being humorous, but it obviously is not the way the law should be read."). The constitutionality of the definition of "personnel" should not stand or fall on the basis of an isolated (and subsequently disavowed) statement made in the heat of oral argument. See *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 309 n.5 (2000) (Scalia, J., concurring in the judgment).

* * * ; and * * * assist PKK members at peace conferences and other meetings." J.A. 58-59. Of course, petitioners could conduct all but the last of those listed activities "entirely independently" of the PKK and LTTE, 18 U.S.C. 2339B(h), in which case their conduct would not be criminal. But petitioners do not wish to do so: they sought to enjoin enforcement of the term "personnel" so that they could coordinate those activities with, and carry them out under the direction and control of, the PKK and LTTE. Because those proposed coordinated activities clearly fall within the statutory definition of "personnel," the court of appeals properly rejected petitioners' as-applied challenge.

4. Helping the PKK and LTTE appear before national and international representative bodies constitutes "services"

a. The term "service" is also not unconstitutionally vague. "Service" refers to "an act done for the benefit or at the command of another" or to "useful labor that does not produce a tangible commodity." *Webster's* 2075. That concept is readily understood by ordinary people. In other contexts, courts of appeals have found similar language to be sufficiently clear to define the scope of criminal liability. See *Humanitarian Law Project* v. *United States Treasury Dep't*, 578 F.3d 1133, 1145-1148 (9th Cir. 2009) (rejecting vagueness challenge to an Executive Order that permits the Secretary of the Treasury to designate entities that provide "financial or other services to or in support of" acts of terrorism); *United States* v. *Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 73, 77 (2d Cir.) (rejecting vagueness challenge to regulations implementing an Executive Order prohibiting any person from engaging in any "service contract" in Iran, because the language in the Executive Order "gave * * * fair notice" of what was prohibited), cert. denied, 479 U.S. 1018 (1986). The word is no less easy to understand in the material-support statute.

Petitioners focus (Br. 34-35) on the portion of the dictionary definition requiring that "an act [be] done for the benefit * * * of another," but ignore the statutory requirement that a "service" be provided "*to* a foreign terrorist organization." 18 U.S.C. 2339B(a)(1) (emphasis added). That limitation requires a direct relationship with the foreign terrorist organization that benefits from the proferred service. See p. 22, *supra*. A speaker or writer who acts independently of a foreign terrorist organization may in fact benefit that organization, but he does not "knowingly provide[] material support or resources to a foreign terrorist organization" within the meaning of the statute. Petitioners simply cannot reconcile themselves to the statute's basic distinction between independent and concerted action.

b. Whatever ambiguity petitioners might generate from viewing the term "service" in isolation, the word is unambiguous in context. Section 2339A(b)(1) forbids providing a number of types of support to foreign terrorist organizations, including "currency or monetary instruments or financial securities, financial services, lodging, * * * safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, * * * and transportation." The term "service" must be understood in the context of those other types of material support. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, * * * while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."). As this list indicates, Congress was concerned with "service[s]" that are rendered directly to a foreign terrorist organization, not to any and all acts that may be of some benefit.

Similarly, petitioners are incorrect (Br. 39) that the term "service" should be read to include the types of conduct expressly excluded from the definitions of "training," "expert advice or assistance," and "personnel." This Court interprets statutes to avoid constitutional doubts, not to create them. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Accordingly, "the various provisions of the Act should be read *in pari materia*," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985), and the term "service" should not be expanded to cover types of conduct expressly excluded by other statutory provisions. Petitioners cite (Br. 39) cases upholding vagueness challenges when the statutory text was "active[ly] misleading," *Raley* v. *Ohio*, 360 U.S. 423, 438 (1959), or issued "[i]nexplicably contradictory commands," *ibid.* (describing *United States* v. *Cardiff*, 344 U.S. 174 (1952)). Neither of those two circumstances is remotely present here.

Moreover, even if the term "service" can plausibly be read as petitioners suggest, it no less reasonably can be interpreted to mean an action "done * * * at the command of" that organization to further its goals and objectives. *Webster's* 2075. Interpreted in that way, the statute would raise no vagueness concern at all. It is well-settled that "when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.'" *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. the Att'y Gen. of the United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The statute's text plainly requires that a "service" be rendered "to" a foreign terrorist organization (which requires a direct relationship). Any remaining ambiguity is easily avoided by interpreting the statute to require that a "service" be done at the terrorist organization's command or behest.[9]

c. Although their hypotheticals suggest otherwise (Br. 34-35), petitioners do not seek to render an indirect benefit to the PKK and LTTE. Rather, they want to render benefit *directly* to those groups by coordinating their actions. As petitioners explain, they seek to "assist[] the PKK in appearing before national and international representative bodies such as the United Nations Human Rights Subcommission, the Council of Europe, the United States Congress, and international human rights conferences." J.A. 98. In particular, petitioners seek "to provide training and expert advice and assistance * * * on how to bring claims and appeals of Kurds before the UN and other policy making bodies." J.A. 99. Petitioners' proposed conduct therefore falls squarely within the term "service" on any interpretation. Again, petitioners cannot prevail by pointing to purported vagueness at the margins of the material-support statute, when their proposed activities rest comfortably within its core.

---

[9] Petitioners claim that they are forced "to guess whether joining or affiliating with a group is prohibited" by the term "service." Br. 35. But joining an organization is not usually thought of as providing a "service" to that organization. Petitioners remain free to join or affiliate with the PKK or LTTE. See p. 59-60, *infra*. What petitioners may not do is provide material support or resources to the organization, regardless of whether they are members or affiliates.

B. The Court Of Appeals Confused The Vagueness And Overbreadth Doctrines

The decision of the court of appeals rested in large part on the court's view that prohibiting the provision of any "training," "expert advice or assistance," or "service" to a terrorist group would violate the First Amendment. For example, the court reasoned that "training" is vague because it could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a; see *id.* at 24a ("Because the 'other specialized knowledge' portion of the ban on providing 'expert advice or assistance' continues to cover constitutionally protected advocacy, we hold that it is void for vagueness."); *id.* at 25a (holding that "service" is vague in part "because it is easy to imagine protected expression that falls within the bounds of the term 'service'") (first set of internal quotation marks omitted).

Petitioners understandably make no effort to defend that rationale, because the court of appeals' analysis erroneously conflated two separate constitutional doctrines: vagueness and overbreadth. If the court were correct that "training" could "be read to encompass speech and advocacy protected by the First Amendment," Pet. App. 22a, then the statute might be unconstitutional, as a matter of substantive First Amendment law, in some of its applications. And if those applications were sufficiently numerous in relation to the legitimate applications of the statute, then the statute would be vulnerable to an overbreadth challenge. See *Williams*, 128 S. Ct. at 1838 ("[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."); *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003).

Overbreadth and vagueness, however, are distinct doctrines, and the coverage of a statute, by itself, has nothing to do with whether its meaning is unclear. See *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (That a statute can be applied in many different situations "does not demonstrate ambiguity. It demonstrates breadth."); *Grayned*, 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). Accordingly, the court of appeals erred by conflating petitioners' claim under the Fifth Amendment (*i.e.*, that the statute is unconstitutionally vague) with their claims under the First Amendment (*i.e.*, that the statute unconstitutionally infringes on their rights of free speech and association). For the reasons set forth earlier, the contested terms in the material-support statute all have a clear meaning to an ordinary person, and the former claim therefore lacks merit. And as shown in the next part, the latter claims fare no better.

II. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners' claims of content-based discrimination (Br. 43-55), overbreadth (Br. 42-43), and violation of associational rights (Br. 56-59) have no merit. The material-support statute is a generally applicable regulation of conduct that only incidentally affects expressive activity, rather than a content-based restriction on speech. Even assuming *arguendo* that certain applications of the statute to expression violate the First Amendment, the statute is not overbroad because those applications are not substantial in relation to the statute's plainly legitimate sweep. And the statute does not prevent petitioners from joining or otherwise associating with foreign terrorist organizations. For those reasons, the lower courts, including the courts below, have uniformly rejected arguments that the material-support statute violates the First Amendment.

A. The Statute Is A Regulation Of Conduct That Only Incidentally And Permissibly Affects Expression

Petitioners argue (Br. 23-25, 43-50) that the material-support statute is a content-based regulation of speech subject to strict scrutiny. As the court of appeals held, however, the statute is in fact a regulation of conduct, applying irrespective of any expressive content, and is therefore subject to intermediate scrutiny under *O'Brien*. See Pet. App. 28a; *Humanitarian Law Project*, 205 F.3d at 1135. The statute easily survives such scrutiny because it is narrowly tailored to advance important governmental interests unrelated to the suppression of expression. *Id.* at 1135-1136.

1. Section 2339B regulates conduct without regard to its expressive content

a. Petitioners attempt to frame the material-support statute as a law aimed at "pure speech addressing political issues." Br. 23; *id.* at 23-25. Nothing could be further from the truth. Petitioners remain free, as they say that they wish, "to lobby Congress, to teach and advise on human rights, to promote the peaceful resolution of political disputes, and to advocate for the human rights of minority populations." *Id.* at 23. What petitioners may not do under the statute is something different: engage in certain activities in coordination with, or under the direction or control of, groups that they know have been designated as terrorist organizations or have engaged in terrorist activity. In enacting the material-support statute, Congress regulated a particular type of conduct (*i.e.*, providing direct aid to known terrorist organizations), not a particular type of expression (*e.g.*, advocating for the advancement of human rights). The prohibition on conduct set out in the statute applies irrespective of whether a person conveys a particular message or engages in any expression at all.

For that reason, petitioners' citations (Br. 24, 40) of cases involving content-based restrictions on speech have no relevance here. Section 2339B does not target expression at all, let alone expression of a certain content or viewpoint. It therefore bears no resemblance to the laws that petitioners cite prohibiting the transmission of indecent or offensive telecommunications to minors, *Reno*, 521 U.S. at 871; the distribution of anonymous campaign literature, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995); the publication of offensive information about a person's private affairs, *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975); or the use of vulgar language, *Cohen* v. *California*, 403 U.S. 15, 16 (1971). Unlike those laws, Section 2339B does not prohibit expression except incidentally, and does not punish any person because he is conveying a particular message.

Rather, Section 2339B aims at a certain type of conduct: the provision of material support or resources to foreign terrorist organizations. The statute applies whether the proferred aid takes the form of "property" (like "currency or monetary instruments or financial securities, lodging, * * * safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, [or] explosives") or "service[s]" (like "financial services, * * * training, expert advice or assistance, * * * personnel * * *, [or] transportation"). 18 U.S.C. 2339A(b)(1). The statute thus establishes a broad ban on providing any property or service, other than "medicine or religious materials," to a known terrorist organization. *Ibid.* Sections 2339A and 2339B say nothing about speech, much less about the content of any speaker's message. See *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based."). Those provisions, on their face, regulate specified activities in aid of terrorism.

Contrary to petitioners' argument (Br. 42), the First Amendment analysis is not altered because the statute prohibits "training" and "expert advice or assistance," which usually are accomplished through the use of words. Conspiracy is typically accomplished through words; so too fraud, bribery, and extortion. Training or providing expert advice to terrorists parallels those longstanding crimes. That a particular course of conduct may be—or, indeed, invariably is—effectuated through words does not control the constitutional analysis. The relevant inquiry in a case like this one is whether the statute at issue targets speech directly or instead only incidentally restricts speech as part of regulating harmful activity. See *United States* v. *Albertini*, 472 U.S. 675, 687 (1985) ("Application of a facially neutral regulation that incidentally burdens speech satisfies the

First Amendment" if it meets the *O'Brien* test.); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 604 (2001) (Stevens, J., concurring in part) ("This Court has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression."). The material-support statute, as the court of appeals recognized, does the latter: it aims at the act of giving material support to terrorists—regardless whether accomplished through words and, if accomplished through words, regardless of their expressive content. See Pet. App. 28a (citing *Humanitarian Law Project*, 205 F.3d at 1135).

Nor does it matter to the constitutional analysis whether, in cases in which material support to terrorists takes the form of words, the words at issue are intrinsically blameworthy (*e.g.*, training on how to build a bomb) or seemingly benign (*e.g.*, advice on international law or computer programming). Petitioners even admit as much. See Br. 45 ("[T]he statute's prohibitions reach even speech that is designed to *discourage* terrorism and to promote only lawful, nonviolent activities."). In every instance, the statute's aim is not the content or viewpoint of the speech, but the act of aiding deadly terrorist organizations.

b. Eleven judges of the Ninth Circuit, sitting en banc, unanimously rejected petitioners' content-based discrimination argument on this essential reasoning, referring to an earlier panel opinion. See 393 F.3d at 902. That opinion, in turn, held that "the material support restriction here does not warrant strict scrutiny because it is not aimed at interfering with the expressive component of [petitioners'] conduct but at stopping aid to terrorist groups." *Humanitarian Law Project*, 205 F.3d at 1135. It further held that "[i]ntermediate scrutiny applies where, as here, 'a regulation . . . serves purposes unrelated to the content of expression.'" *Ibid.* (quoting *Ward*, 491 U.S. at 791). Applying intermediate scrutiny, it concluded that the material-support statute satisfies that standard. *Id.* at 1135-1136.

Likewise, the Fourth Circuit, also sitting en banc, has rejected petitioners' argument. See *United States* v. *Hammoud*, 381 F.3d 316 (2004), vacated on other grounds, 543 U.S. 1097, reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005). In *Hammoud*, the court held that the material-support statute is a "facially neutral statute [that] restricts some expressive conduct." As such, the court held, the statute is subject to intermediate scrutiny, which it satisfies. *Id.* at 329. The District of Columbia and Seventh Circuits have rejected similar claims. *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1244-1245 (D.C. Cir. 2003) ("It is conduct and not communication that the statute controls."); *Boim* v. *Quranic Literacy Inst.*, 291 F.3d 1000, 1025-1027 (7th Cir. 2002) ("Under section 2339B, * * * [defendants] may, with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 2339B prohibits only the provision of material support (as that term is defined) to a terrorist organization."); cf. *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 700 (7th Cir. 2008) (en banc), cert. denied, 130 S. Ct. 458 (2009) (*Holy Land*). Petitioners do not point to any decision of any court holding that the material-support statute is a content-based restriction on speech.

2. *Petitioners' arguments that Section 2339B is a content-based restriction on speech are meritless*

a. Petitioners are correct (Br. 45) that the material-support statute is not a content-neutral restriction on the time, place, or manner of their proposed speech. But it does not follow, as petitioners argue, that the statute then must be a content-based restriction on their speech. In fact, as explained above, the statute fits into neither of those categories of speech restrictions; it is instead a generally applicable regulation of conduct that only incidentally impinges on expression. This Court has frequently upheld the application of such statutes to criminalize or otherwise restrict some expression as part of the class of targeted conduct. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985); *O'Brien*, 391 U.S. at 377. The Court has never insisted that such an incidental restriction on speech, assuming it passes muster under the *O'Brien* test, also somehow incorporate characteristics of time, place, or manner regulation.

b. Petitioners assert that "a ban on speech to a chosen audience"—*i.e.*, foreign terrorist organizations—"triggers strict First Amendment scrutiny." Br. 46. Again, the material-support statute is importantly different from the laws cited by petitioners (Br. 46 n.24) restricting editorials by educational broadcasting stations, *FCC* v. *League of Women Voters*, 468 U.S. 364, 366 (1984), or electioneering communications by unions and corporations, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 204 (2003). Unlike those laws, Section 2339B does not restrict a particular kind of speech, by a particular set of speakers, for the benefit of the public. Petitioners are free to communicate with the public, as the speakers wished to do in the cases that petitioners cite, about ideas held by the PKK and LTTE. And just as importantly, petitioners are free to join and communicate with the members of the PKK or LTTE, so long as they do not use that communication as a vehicle for conveying material assistance. That is because Section 2339B regulates not speakers attempting to reach particular audiences, but providers of property and services seeking to assist organizations defined by their terrorist conduct.

c. Petitioners contend (Br. 48-50) that the statute is content-based because it prohibits material support only to certain foreign terrorist organizations (as designated by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General). The Secretary of State, however, has the authority to designate such an organization only if she finds that it "engages in terrorist activity" that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1).[10] In other words, the designation itself is based on groups' conduct, not on the content of their speech or the nature of their political beliefs. Cf. Pet. Br. 49-50 (hypothesizing a statute that favored particular political parties). Congress thus did not prohibit speech in support of certain disfavored speakers; it instead prohibited conduct in support of certain dangerous actors. And petitioners point to no evidence in this as-applied challenge that the PKK and LTTE were designated as terrorist organizations based on anything other than their commission of terrorist acts.

---

[10] In the event that an organization wishes to dispute the basis for its designation, it may file a petition for review in the District of Columbia Circuit. 8 U.S.C. 1189(c). Here, the LTTE challenged its designation, which the District of Columbia Circuit upheld. *People's Mojahedin Org. of Iran*, 182 F.3d at 24-25.

Similarly, petitioners argue (Br. 48) that the material-support statute is content-based because its terms distinguish between various types of conduct. For instance, the term "training" prohibits imparting a specific skill but not general knowledge; and the term "expert advice or assistance" applies only to scientific, technical, or other specialized knowledge. But this Court "[has] never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 721. Congress distinguished between general and specialized knowledge in order to identify the types of training or expert assistance that—like providing safehouses or weapons—are particularly likely to advance the goals and objectives of terrorist groups. Classifications between forms of support to organizations, based on such neutral and legitimate governmental interests, do not become content-based restrictions on speech because they incidentally affect some but not all expressive activity. See *Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").[11]

---

[11] Petitioners also claim (Br. 48) that the statute is content-based because it permits the provision of medicine and religious materials. See 18 U.S.C. 2339A(b)(1). The court of appeals correctly found that Congress "is entitled to strike such delicate balances," in recognition of humanitarian and religious values, "without giving up its ability to prohibit other types [of] assistance which would promote terrorism." *Humanitarian Law Project*, 205 F.3d at 1136 n.4.

3. *Section 2339B is narrowly tailored to advance important governmental interests*

a. Because it regulates conduct and only incidentally restricts speech, the material-support statute is subject to intermediate scrutiny. See *Albertini*, 472 U.S. at 687-688; *O'Brien*, 391 U.S. at 377. The lower courts in this case, joining every court to face the issue, concluded that Section 2339B easily survives such scrutiny: it is within Congress's power to enact; it promotes an important (indeed, compelling) government interest; it is aimed at stopping aid to terrorists, rather than at suppressing free expression or association; and it is reasonably tailored, restricting expressive rights no more than is necessary. See *Humanitarian Law Project*, 205 F.3d at 1135-1136; see also *Hammoud*, 381 F.3d at 329 ("Section 2339B satisfies all four prongs of the *O'Brien* test.").

Petitioners understandably do not dispute that Section 2339B satisfies the first, second, and third prongs of the *O'Brien* test. First, Congress "clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities; such regulations have been upheld in the past over a variety of constitutional challenges." *Humanitarian Law Project*, 205 F.3d at 1135 (citing cases). In their brief, petitioners advance (Br. 49, 70) hypotheticals involving the regulation of speech in the domestic context. But the material-support statute is fundamentally different: it restricts individuals' ability to act in concert with foreign entities. See, *e.g.*, *DKT Mem'l Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275, 295 (D.C. Cir. 1989) ("[T]he right of Americans to associate with nonresident aliens is not an absolute.") (internal quotation marks and citation omitted). Such a regulation is within "[t]he constitutional power of Congress." *O'Brien*, 391 U.S. at 377.

Second, "the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that that interest is substantial." *Humanitarian Law Project*, 205 F.3d at 1135; see *Wayte*, 470 U.S. at 611 ("Few interests can be more compelling than a nation's need to ensure its own security."). Since 2001, the United States has charged approximately 150 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and to date approximately 75 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance," "personnel" or "service," see *United States* v. *Kassir*, No. 04 CR 356 (JFK), 2009 WL 2913651, at *1 (S.D.N.Y. Sept. 11, 2009) (defendant convicted for providing jihad training to young men and disseminating training manuals to terrorist groups, among them al Qaeda), including to the LTTE, one of the terrorist organizations at issue here, see *United States* v. *Kandasamy*, No. 06 CR 616 (RJD), 2008 WL 2660610, at *1 (E.D.N.Y. July 3, 2008) (alleging that a defendant "assisted LTTE members in procuring military weaponry worth millions of dollars, including missiles, firearms, explosives, artillery and radar"), aff'd, No. 08-3589-CR, 2009 WL 692113 (2d Cir. Mar. 18, 2009). Those prosecutions, and others like them under the material-support statute, have prevented substantial harm to the nation.

Third, the government's interest in preventing the spread of terrorism and the occurrence of terrorist acts "is unrelated to suppressing free expression because [Section 2339B] restricts the actions of those who wish to provide material support to [terrorist] groups, not the expression of those who advocate or believe the ideas that the groups support[]." *Humanitarian Law Project*, 205 F.3d at 1135; see *Hammoud*, 381 F.3d at 329 ("Hammoud is free to advocate in favor of Hizballah or its political objectives—§ 2339B does not target such advocacy."); *Taleb-Jedi*, 566 F. Supp. 2d at 177 ("Defendant remains free to sympathize with or advocate in favor of the PMOI."). In enacting Section 2339B, Congress prohibited the forms of support to terrorist organizations that strengthen their capacity to commit acts of violence and destruction. Congress did not prohibit individuals from joining terrorist groups, expressing solidarity with them, or even inciting others to engage in terrorist conduct. And petitioners have not presented any evidence that the statute would be applied in this case for any purpose related to suppressing expression. The third prong of *O'Brien* is thus also met.

b. Petitioners dispute (Br. 65) that Section 2339B is tailored to its goal, but their claim that Congress was "[w]ithout evidence" to support Section 2339B's prohibition ignores the rationale established in the legislative record. *Ibid.* There, Congress found that terrorist organizations "have established footholds within ethnic or resident alien communities in the United States" and can "operate under the cloak of a humanitarian or charitable exercise." H.R. Rep. No. 383, 104th Cong., 1st Sess. 43 (1995) (*1995 House Report*) (report on predecessor bill). Congress further found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7), 110 Stat. 1247.

In particular, Congress determined that "the fungibility of financial resources and other types of material support" would permit individuals "to supply funds, goods, or services to an organization," which would "help[] defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." *1995 House Report* 81. As Congress explained, "[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further their terrorist activities abroad." *Id.* at 45. As the court of appeals concluded, "[i]t follows that all material support given to such organizations aids their unlawful goals." *Humanitarian Law Project*, 205 F.3d at 1136.

According to the State Department, "[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly supports this congressional finding." J.A. 133. "[I]t is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions," because they "do not maintain organizational 'firewalls' that would prevent or deter such sharing and commingling of support and benefits." J.A. 133, 135 (emphasis omitted). Moreover, to the extent that some terrorist groups have "political or humanitarian components," they use those components "to support the establishment of logistical infrastructure (communications, housing and the like) and intelligence networks," J.A. 134, "to recruit personnel to carry out terrorist operations," and "to provide support to criminal terrorists and their families in aid of such operations," J.A. 135.

Petitioners claim (Br. 12, 65) that they intend to discourage terrorism, but their motives are irrelevant in light of Congress' findings. In Congress' view, providing assistance, whether tangible or intangible, frees resources that terrorists can and often do allocate to criminal and violent activities. J.A. 136-137. And even the provision of seemingly benign services (like legal advice or communications assistance) bolsters a terrorist organization's efficacy and strength in a community, thus undermining this nation's efforts to delegitimize and weaken these groups. See *Holy Land*, 549 F.3d at 698 ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities.").

Although petitioners previously sought to provide funds to the PKK and LTTE (Br. 16 n.10), they now concede that the statute is constitutional as applied to "financial aid and non-speech support." *Id.* at 55. It is certainly true that funds given to terrorist organizations, even for avowedly political or humanitarian purposes, can be used to support terrorist activities. See ADL Amicus Br. 19-31 (detailing use of humanitarian aid for terrorist efforts by the PKK, LTTE and Hamas). But it is equally true, in Congress' view, that other types of support—including personnel, training, and other services—can have similarly harmful consequences for American interests. Petitioners attempt to second-guess that judgment, but this Court should not. That is especially so because this case involves sensitive national security and foreign affairs interests, to which a heightened degree of deference to Congress and the Executive Branch is warranted. *Humanitarian Law Project*, 205 F.3d at 1136 ("Because the judgment of how best to achieve that end [of combating terrorism] is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal."); see *Regan* v. *Wald*, 468 U.S. 222, 242 (1984); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

Likewise, petitioners conceded in the lower courts that the government could prohibit all forms of material support to al Qaeda. See Pet. C.A. Br. 32 n.13; *Media for Case* (13:53-14:10). Petitioners' argument thus amounts to a claim that Congress may not expand the prohibition beyond al Qaeda to other terrorist groups. Whatever the basis for that argument, it cannot have to do with vagueness, content-discrimination, or associational rights. In fact, petitioners' rationale must be that aid to al Qaeda inevitably supports terrorist activities, while aid to other terrorist organizations does not. But Congress reached a different judgment, and that judgment is the one entitled to respect. This Court should reject petitioners' attempt to cloak in constitutional garb what petitioners' own arguments reveal to be an attack on legislative policy.

B. The Statute Is Not Overbroad

To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. *Hicks*, 539 U.S. at 119-120; see *Williams*, 128 S. Ct. at 1838. Even assuming Section 2339B has any unconstitutional applications, they are insufficiently substantial, either in absolute number or in relation to the statute's plainly legitimate sweep, to render the statute unconstitutionally overbroad. For that reason, lower courts have uniformly rejected overbreadth challenges to Section 2339B.[12] That uniform conclusion is not surprising, given the nature of the material-support statute. As this Court has observed, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Hicks*, 539 U.S. at 124.

The court of appeals noted Section 2339B's "many legitimate applications." Pet. App. 28a. For instance, "[it] can legitimately be applied to criminalize facilitation of terrorism in the form of providing foreign terrorist organizations with income, weapons, or expertise in constructing explosive devices." *Ibid.* Petitioners themselves see no constitutional difficulty in applying the statute to "material support in the form of financial aid and other non-speech support." Br. 55. That concession is fatal to their overbreadth claim. It means, as the court below held, that "although [petitioners] may be able to identify particular instances of protected speech that may fall within the statute, those instances are not substantial when compared to the legitimate applications of [S]ection 2339B(a)." Pet. App. 29a. At the least, petitioners make no effort to demonstrate that any overbreadth is substantial in relation to Section 2339B's plainly legitimate sweep.

Moreover, as this Court has explained, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Hicks*, 539 U.S. at 119; see Pet. App. 28a. If petitioners were correct that the material-support statute is overbroad on its face, then the government would not be able to enforce the statute in any of its applications. The court of appeals rightly recognized that such a holding "would potentially be placing our nation in danger of future terrorist attacks." *Id.* at 29a.

---

[12] See, *e.g.*, *Hammoud*, 381 F.3d at 330; *Taleb-Jedi*, 566 F. Supp. 2d at 185; *Warsame*, 537 F. Supp. 2d at 1016; *Shah*, 474 F. Supp. 2d at 499 n.6; *Awan*, 459 F. Supp. 2d at 180; *United States* v. *Assi*, 414 F. Supp. 2d 707, 717 (E.D. Mich. 2006); *Marzook*, 383 F. Supp. 2d at 1062-1063; *United States* v. *Sattar*, 272 F. Supp. 2d 348, 362 (S.D.N.Y. 2003).

C. The Statute Does Not Infringe Petitioners' Right Of Association

Likewise, the court of appeals properly rejected petitioners' argument (Br. 56-59) that the material-support statute targets association protected under the First Amendment: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Petitioners] are even free to praise the groups for using terrorism as a means of achieving their ends. What [the statute] prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions." *Humanitarian Law Project*, 205 F.3d at 1133; see *Hammoud*, 381 F.3d at 329 ("Hammoud's argument fails because § 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated [foreign terrorist organization].").

Indeed, Congress took special care not to infringe upon associational rights. Recognizing that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," *1995 House Report* 43, Congress observed that the statutory ban "only affects one's contribution of financial or material resources" because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities," *id.* at 44. Congress made clear, however, that "[t]hose inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations." *Id.* at 45. Accordingly, "[t]he basic protection of free association afforded individuals under the First Amendment remains in place." *Id.* at 44.

Petitioners cite (Br. 57 n.30) a number of cases involving attempts to attach civil or criminal sanctions to membership in the Communist Party. Those cases hold that attaching liability to membership in an organization requires proof of specific intent to further that group's unlawful (rather than its lawful) activities. See *United States* v. *Robel*, 389 U.S. 258, 262, 265-266 (1967); *Keyishian* v. *Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 609-610 (1967); *Noto* v. *United States*, 367 U.S. 290, 299-300 (1961). But that specific intent requirement applies only when "liability [is] imposed by reason of association alone." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Here, Section 2339B does not prevent petitioners from becoming members of the PKK and LTTE or impose any sanction on them for doing so. The provision sanctions an entirely different activity, which need not and often does not have any relation to membership.

Petitioners rely (Br. 57-58) extensively on *De Jonge* v. *Oregon*, 299 U.S. 353 (1937), which set aside a state criminal conviction "for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated." *Id.* at 357. But the only assistance involved in that case was advocacy of the

Communist Party and its views. As this Court explained, "peaceable assembly for lawful discussion cannot be made a crime." *Id.* at 365. Section 2339B is fully consistent with this principle: it does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.

Finally, petitioners argue (Br. 62-63), in reliance on *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000), and *Elrod* v. *Burns*, 427 U.S. 347 (1976), that Section 2339B directly regulates expressive association. In *Dale*, this Court found that the Boy Scouts of America was "an expressive association" and that a statute forbidding its exclusion of gays and lesbians would "significantly affect its expression." 530 U.S. at 656. The Court therefore concluded that the statute "directly and immediately affect[ed] associational rights," requiring the application of strict scrutiny. *Id.* at 659; see *Elrod*, 427 U.S. at 363 n.17 (plurality opinion) (finding that the political patronage dismissals at issue sought to control "association and belief *per se*"). By contrast, Section 2339B does not regulate the membership of any organization, expressive or otherwise. Nor does Section 2339B compel any organization to convey a message at odds with its fundamental beliefs, as did the statute in *Dale*. See 530 U.S. at 653-654. Section 2339B prohibits only the provision of aid to terrorists, and to the extent it burdens associational rights at all, it does so only incidentally.

III. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID DO NOT REQUIRE SPECIFIC INTENT TO FURTHER THE TERRORIST ORGANIZATION'S UNLAWFUL ACTIVITIES

1. Before the court of appeals, petitioners argued that the material-support statute imposes "guilt by association" in violation of the Fifth Amendment's Due Process Clause unless it is interpreted to require specific intent to further a terrorist organization's unlawful activities. See Pet. C.A. Br. 19-36; Pet. C.A. Reply Br. 11-19.[13] Petitioners made the same argument in passing in their cross-petition to this Court. See Cross-Pet. 11 & n.10. In their opening brief, however, petitioners abandon that argument. Nowhere do they argue that the statute violates due process because it imposes guilt by association. To be sure, petitioners assert in a footnote that they "have preserved the argument[]," Br. 43 n.23, but that reference is insufficient to justify this Court's review. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004) ("[Respondent's] brief contains one footnote seeking to incorporate by reference [certain] arguments * * * before the Court of Appeals. That is not enough to raise the question fairly, and we do not consider it.") (internal citation omitted).

Petitioners now raise a different avoidance argument. Rather than claim that the material-support statute violates due process if not interpreted to require specific intent, petitioners contend (Br. 65-69 & n.32) that this Court can avoid resolving all of petitioners' constitutional claims by construing the statute to require specific intent. The lower courts had no opportunity to address that contention. And this Court should decline to address an argument raised for the first time—after 11 years of litigation, *id.* at 5a—in petitioners' opening brief. *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks and citation omitted); see *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998).

---

[13] The lower courts rejected petitioners' argument that the material-support statute imposes guilt by association. See Pet. App. 13a-19a; *id.* at 18a ("In sum, because section 2339B does not impose 'vicarious criminal liability,' due process is satisfied without proof of specific intent to further the organization's illegal goals."); *id.* at 19a ("Because there is no Fifth Amendment due process violation, we affirm the district court on this issue.").

2. In any event, construing the statute to require specific intent would not avoid resolution of petitioners' constitutional claims. Petitioners' vagueness claim under the Fifth Amendment would remain, because requiring a heightened *mens rea* does nothing to clarify what *actus reus* violates the statute. For example, the term "training," as defined by the statute, prohibits imparting a specific skill but not general knowledge to a foreign terrorist organization. If petitioners are correct that there is no intelligible difference between those two acts, then even someone who intends to further unlawful terrorist activity cannot be certain when his instruction has strayed into forbidden territory. Moreover, petitioners' facial overbreadth claim under the First Amendment apparently would remain, because petitioners maintain that their construction, although protecting their own activities, "would not necessarily save the statute's constitutionality in every context." Br. 66 n.32 (emphasis omitted). Petitioners' proposed avoidance strategy thus fails to deliver its purported benefits.

3. a. Moreover, as the court of appeals explained, the strategy is unavailable because the material-support statute simply does not require specific intent to further unlawful terrorist activities. Pet. App. 13a-19a; see *Scales*, 367 U.S. at 211 ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute."). This Court has "long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *United States* v. *Balint*, 258 U.S. 250, 253 (1922)). In IRTPA, Congress amended the material-support statute to make the scienter requirement unmistakable: "a person must have knowledge that the organization is a designated terrorist organization * * * , that the organization has engaged or engages in terrorist activity * * * , or that the organization has engaged or engages in terrorism." 18 U.S.C. 2339B(a)(1). Petitioners' proposed specific intent requirement is flatly inconsistent with Congress' express scienter requirement.

Congress' rejection of a specific intent requirement is even clearer when Section 2339B (which prohibits providing material support to foreign terrorist organizations) is placed alongside Section 2339A (which prohibits providing material support to terrorists) and Section 2339C (which prohibits financing terrorism). In both Sections 2339A and 2339C, Congress required the specific intent to further acts of terrorism. See 18 U.S.C. 2339A(a); 18 U.S.C. 2339C(a)(1). Indeed, Section 2339A(a) has precisely the specific intent requirement that petitioners urge here: it prohibits "provid[ing] material support or resources * * *, knowing or intending that they are to be used in preparation for, or in carrying out" various criminal acts. If Congress had intended the same requirement to apply in Section 2339B, it could and would have said so. See *Warsame*, 537 F. Supp. 2d at 1013 ("Congress's inclusion of an explicit *mens rea* requirement in § 2339A strongly suggests that it chose not to include a specific intent requirement in § 2339B.").

Indeed, Congress added IRTPA's scienter requirement in the face of conflicting judicial decisions on the subject. Whereas some decisions had held that the prior version of the statute required only knowledge that the donee organization was a designated foreign terrorist organization or engaged in terrorist activities, see 352 F.3d at 400; see also *Hammoud*, 381 F.3d at 342 & n.12, other decisions had interpreted the statute to require the specific intent to further the organization's unlawful activities, see *United States* v. *Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004); cf. *Hammoud*, 381 F.3d at 374-380 (Gregory, J., dissenting). Congress is presumed aware of the legal backdrop against which it acts, *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979), and here Congress' decision not to require specific intent to further a terrorist organization's unlawful activities was specifically intended to settle the judicial conflict.

b. Petitioners rely (Br. 66-69) for their approach on *Scales*, *supra*. That case concerned a clause in the Smith Act, 18 U.S.C. 2385, prohibiting membership in "any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any [domestic] government by force or violence; * * * knowing the purposes thereof." This Court held that a member can violate that clause only if he possesses "knowledge of the [group's] illegal advocacy and a specific intent to bring about violent overthrow." *Scales*, 367 U.S. at 220.

Once again, petitioners attempt to equate the material-support statute with a prohibition on membership. But as the court of appeals explained, *Scales* is importantly different from this case. Pet. App. 16a. Unlike Section 2339B, the Smith Act aims directly at freedom of association. In that context, specific intent is necessary to distinguish protected association from unprotected (and potentially violent) conduct. See *Scales*, 367 U.S. at 229; *ibid.* ("If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired."). By contrast, Section 2339B does not target First Amendment rights, and "does not proscribe membership in or association with the terrorist organizations." Pet. App. 16a. Rather, it targets a form of conduct—*i.e.*, the provision of material support or resources to foreign terrorist organizations—that does not merit special constitutional protection. And unlike the Smith Act, Section 2339B specifies the knowledge required to make such conduct criminal: knowledge that the recipient is a designated foreign terrorist organization or engages in terrorist activities. No element of specific intent is therefore necessary to separate wrongful from innocent conduct. See *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (requiring courts "to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct") (internal quotation marks and citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it held certain terms in Sections 2339A and 2339B unconstitutionally vague and in all other respects affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

DECEMBER 2009

REPLY
BRIEF

B690

Supreme Court, U.S.
FILED
JAN 21 2010
OFFICE OF THE CLERK

(17) (16)

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.
HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL., CROSS-PETITIONERS
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR HUMANITARIAN LAW PROJECT, ET AL.

DAVID D. COLE
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
cole@law.georgetown.edu
(202) 662-9078
Counsel of Record for
Respondents / Cross-Petitioners
Humanitarian Law Project et al.

(additional counsel on following page)

BOTH 5C6M06

SHAYANA KADIDAL
JULES LOBEL
JOSHUA M. ROSENTHAL
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South
#14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow, Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN RUDRAKUMARAN
875 Ave. of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents in 08-1498
and Cross-Petitioners in 09-89,
Humanitarian Law Project et al.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE CHALLENGED PROVISIONS ARE IMPERMISSIBLY VAGUE 4

  A. Training 7
  B. Expert Advice or Assistance 9
  C. Service 12
  D. Personnel 15
  E. The Provisions Are Invalid on Their Face 18

II. THE CHALLENGED PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY IMPOSE CONTENT BASED PROHIBITIONS ON SPEECH BASED ON ITS COMMUNICATIVE IMPACT 20

  A. *O'Brien* Does Not Apply to Provisions That Criminalize Pure Speech Based on Its Communicative Impact 20
  B. *O'Brien* Does Not Apply Because the Challenged Provisions Are Not Content-Neutral 27
  C. The Provisions Cannot Survive Even Intermediate Scrutiny 30

III. THE CHALLENGED PROVISIONS VIOLATE PLAINTIFFS' RIGHTS OF ASSOCIATION 36

IV. THE COURT CAN AVOID THE CONSTITUTIONAL QUESTIONS PRESENTED BY ADOPTING A SPECIFIC INTENT REQUIREMENT.............39

V. GRANTING PLAINTIFFS RELIEF WILL NOT IMPEDE THE GOVERNMENT'S LEGITIMATE INTERESTS IN NATIONAL SECURITY........42

CONCLUSION...44

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002)..31

Bartnicki v. Vopper,
532 U.S. 514 (2001)..31

Boos v. Barry,
485 U.S. 312 (1988)..29

Bose Corp. v. Consumers Union,
466 U.S. 485 (1984)..33

Cantwell v. Connecticut,
310 U.S.296 (1940).. 26-27

Citizens United v. FEC, No. 08-205,
(U.S. Jan. 21, 2010)..................................20, 22, 40, 44

Cohen v. California,
403 U.S. 15 (1971)... 22-24, 26

Cox v. Louisiana,
379 U.S. 536 (1965)..................................19, 26, 31, 43

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975)..22

De Jonge v. Oregon,
299 U.S. 353 (1937).....................27, 31, 36-37, 39, 43

DKT Mem'l. Fund Ltd. v. Agency for Int'l Dev.
887 F.2d 275 (D.C. Cir. 1989) 37

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*,
485 U.S. 568 (1988) 40

Edwards v. South Carolina,
372 U.S. 229 (1963)) 26

Federal Election Commission v. Wisconsin Right to Life, 551 US 449 (2007) 31

Fisher v. City of Berkeley,
475 U.S. 260 (1986) 16

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 7

Greater New Orleans Broadcasting Ass'n, Inc., v. United States, 527 U.S. 173 (1999).......:............32

Gregory v. City of Chicago,
394 U.S. 111 (1969) 26, 31

Healey v. Leavitt,
485 F.3d 63 (2d Cir. 2007) 9

Herndon v. Lowery,
301 U.S. 242 (1937) 39

Hill v. Colorado,
530 U.S. 703 (2000) 29-30

Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003), *vacated and remanded in light of intervening legislation by* 393 F.3d 902 (9th Cir. 2004) (en banc)....................41

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993)....................28

Lamont v. Postmaster General, 381 U.S. 301 (1965)....................37

NAACP v. Button, 371 U.S. 415 (1963)....................37, 39

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)....................27, 39

Pierce v. Underwood, 487 U.S. 552 (1988)....................8, 10

Police Dept of Chicago v. Mosley, 408 U.S. 92 (1972)....................2

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)....................38

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995)....................28

Rumsfeld v. FAIR, 547 U.S. 47 (2006)....................6

Scales v. United States, 367 U.S. 203 (1961)....................35, 39, 41-42

Smith v. Goguen,
415 U.S. 566 (1974)..5

Street v. New York,
394 U.S. 576 (1969)..22, 24

Taylor v. Mississippi,
319 U.S. 583 (1943)..31

Texas v. Johnson,
491 U.S. 397 (1989)..................................21, 23, 30

Thomas v. Collins,
323 U.S. 516 (1945)..20

Turner Broadcasting Systems, Inc. v. FCC,
512 US 622 (1994)..32

United States v. Albertini,
472 U.S. 675 (1985)..25

United States v. Container Corp. of Am.,
393 U.S. 333 (1969)..16

United States v. Goba,
220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) 18

United States v. Lindh,
212 F. Supp. 2d 541 (E.D. Va. 2002)......................18

United States v. O'Brien,
391 U.S. 367 (1968)................. 2, 20-22, 24-28, 30-31

United States v. Taleb-Jedi,
566 F. Supp. 2d 157 (E.D.N.Y. 2008) 18

United States v. Warsame,
537 F. Supp. 2d 1005 (D. Minn. 2008) 18

United States v. Williams,
128 S. Ct. 1830 (2008) 18, 26, 41

United States v. Wivell,
893 F.2d 156 (8th Cir. 1990) 9

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 32

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 5, 19

BRIEFS

U.S. Br., *Dennis v. United States*,
341 U.S. 494 (1951), (No. 336), 1950 WL 78653 37

U.S. Br. on Reargument,
Scales v. United States, 367 U.S. 203 (1961)
(No. 1), 1959 WL 101542 35

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I .... *passim*

U.S. CONST. amend. V 5, 42

STATUTES

Bipartisan Campaign Reform Act (BCRA),
2 U.S.C. § 431, ...31

Sherman Act,
15 U.S.C. § 1 15-16

18 U.S.C. §175b(d)(2)(G) 17

18 U.S.C. § 951 17-18

18 U.S.C. § 2339A 42

18 U.S.C. § 2339B .... *passim*

    18 U.S.C. § 2339B(h) 17

    18 U.S.C. § 2339B(i) 12, 33

18 U.S.C. § 2339C 42

Equal Access to Justice Act (EAJA),
28 U.S.C. § 2412, ...8

Anti-Terrorism and Effective Death Penalty Act
of 1996 (AEDPA), Pub. L. No. 104-132,
110 Stat. 1214 (April 24, 1996),
§ 301(a)(7) 33

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-383 (1995) 33

FEDERAL RULES AND REGULATIONS

31 C.F.R. § 597.505(a) 19

Fed. R. Evid. 702 10

TREATISE

Philip Areeda & Herbert Hovenkamp,
Antitrust Law (2d ed. 2003) 16

OTHER AUTHORITIES

John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*,
88 Harv. L. Rev. 1482 (1975) 23

Elena Kagan, *When A Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*,
29 U.C. Davis L. Rev. 957 (1996) 24

Eugene Volokh, *Speech as Conduct: Generally Applicable Law, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones*,
90 Corn. L. Rev. 1277 (2005) 23-24, 27

INTRODUCTION AND SUMMARY OF ARGUMENT

As applied here, the four challenged provisions in 18 U.S.C. § 2339B directly prohibit pure political speech, facially discriminate on the basis of content, and hinge severe criminal penalties on such indeterminate distinctions as that between "general" and "specialized" knowledge—classic terms of degree that force plaintiffs to guess as to whether their speech is protected or proscribed. The government concedes that the provisions make it a crime to advocate lawful, peaceable activities in concert with a proscribed group, yet fail to cite a single decision upholding the imposition of such penalties on pure speech.

The government's central argument is that because the statute *also* penalizes conduct, it may be applied to criminalize plaintiffs' pure speech—even where the only asserted or conceivable basis for *this application* (the question in an as-applied challenge) is the communicative impact of the speech or of the association involved in coordinating the speech. That is not the law. The government cannot penalize otherwise lawful pure speech for its content simply because it also penalizes conduct.

1. All four challenged provisions ("training," "expert advice or assistance," "service," and "personnel") are impermissibly vague. The government, in arguing otherwise, declines even to apply the heightened vagueness standard applicable where a criminal statute implicates First Amendment freedoms. It identifies no other statute using the terms at issue to divide criminal from non-criminal activities involving speech. And the government's attempts to explain the challenged provisions only further confuse mat-

ters. Indeed, the provisions are so vague that they render their use in the statute facially overbroad.

2. The government's contention that the provisions are a content-neutral conduct regulation that only "incidentally" criminalizes expression, warranting (and satisfying) intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), fails for multiple reasons.

First, as applied here, the challenged provisions penalize *speech*, not *conduct*, and do so based on its communicative impact. *O'Brien* applies only to laws regulating the "nonspeech element" of expressive conduct, 391 U.S. at 376, and serving interests "unrelated to the suppression of free expression," *id.* at 377. As applied to plaintiffs' proposed pure speech, there is literally no "nonspeech element" to regulate. The only way that plaintiffs' speech could conceivably implicate the government's asserted interests in denying aid or legitimacy to proscribed organizations is by virtue of what it communicates. *O'Brien* no more applies here than it would if a law criminalizing all "conduct that interfered with the draft" were applied to an anti-draft op-ed essay.

Second, the provisions discriminate on the basis of content, and *O'Brien* is reserved for content-neutral laws. The statute permits unlimited provision of religious materials, thereby favoring religious over all other expression. *O'Brien* is therefore inapplicable here, as it would be to a ban on destroying draft cards except for religious reasons. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972). And the provisions favor instruction and advice based on "general knowledge" over speech whose content imparts a "specific skill" or is derived from scientific, technical, or other specialized knowledge—explicit content-based distinctions.

Third, the challenged provisions fail even under the *O'Brien* standard. The government's interest, in applying the provisions at issue to plaintiffs' speech, is not "unrelated to the suppression of expression." And the provisions penalize much more speech than necessary; the government has offered no valid reason for criminalizing speech that advocates only lawful, nonviolent activity (while at the same time tolerating unlimited donation of religious materials or "independent advocacy" urging violent terrorism).

3. The challenged provisions also impair plaintiffs' right of association. The provisions criminalize speech based on the political identity of its recipient or beneficiary. The very same speech, association, and coordination are allowed if a non-designated organization is involved, even if that organization engages in widespread terrorism. It is not enough that plaintiffs are free merely to *join* a designated organization. A law that criminalized any advocacy communicated in coordination with Greenpeace International, a foreign organization that engages in legal as well as illegal conduct, would impair associational freedoms even if it allowed nominal membership in Greenpeace. At a minimum, the right of association must encompass the right to speak to and in conjunction with groups one has a right to join.

4. The Court may avoid definitively pronouncing on all of the foregoing defects by reading Section 2339B to require specific intent to further the terrorist activities of the designated terrorist organization when speech is at issue. Congress expressly directed the courts to interpret Section

2339B to avoid First Amendment infringement. And this Court followed a similar course in construing the Smith Act decades ago, involving an organization (the Communist Party) likewise found to engage in international terrorism. A specific intent requirement would resolve this particular case, because plaintiffs undisputedly seek only to further the LTTE's or PKK's lawful activities. Whether such a construction would "save" the statute from every conceivable future constitutional challenge is irrelevant; the constitutional avoidance principle is guided by "avoidance," not "saving."

5. Protecting plaintiffs' right to engage in lawful, nonviolent speech—on statutory or constitutional grounds—will not remotely threaten the government's compelling interests in fighting terrorism. Section 2339B would remain fully applicable to all nonspeech conduct, and would be inapplicable only to peaceable speech that is not intended to further the illegal, much less terrorist, ends of a group. The government has not come close to supporting its broad argument that practical security concerns require that the challenged provisions be upheld as applied to the particular speech at issue here. Indeed, it has not cited a single prosecution under the statute for speech remotely like plaintiffs'.

ARGUMENT

I. THE CHALLENGED PROVISIONS ARE IMPERMISSIBLY VAGUE

The challenged provisions force plaintiffs to guess whether their proposed political advocacy, human rights training, and peacemaking assistance is derived from or imparts "general" or "specialized" knowledge, is done "for the benefit of" the recipient group or for other purposes, or is conducted independently or in some unspecified coordinated fashion. If they guess wrong, they face a felony terrorist conviction and up to fifteen years in prison. Where, as here, such open-ended and indeterminate standards mark the difference between permitted speech and a serious crime, the First and Fifth Amendments require far greater precision than the statute provides.

The government first argues that the provisions need not satisfy the heightened vagueness standards applicable to criminal statutes that impinge on First Amendment freedoms, because, in the government's view, the statute regulates conduct, not speech, and does not violate the First Amendment. U.S. Br. 17. As we show in Point II, the government's premise is incorrect, as the provisions do violate the First Amendment as applied to plaintiffs' pure speech. But more fundamentally, the government mischaracterizes vagueness doctrine.

Heightened standards apply not merely to statutes that otherwise *violate* the First Amendment, but to statutes that are "capable of reaching" protected speech. *Smith v. Goguen*, 415 U.S. 566, 573 & n.10 (1974); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (heightened vagueness standard applies if statute "threatens to inhibit the exercise of constitutionally protected rights"). If the heightened standard applied only to laws that independently violate the First Amendment, it would be redundant, because any statute to which it applied would be independently unconstitutional on other grounds.

The government cannot deny that the provisions are "capable of reaching" protected expression. It insists that they criminalize human rights advocacy, amicus briefs, op-ed essays, and lobbying Congress—all classic forms of protected speech—so long as they are done in conjunction with a proscribed group. And its invocation of *O'Brien's* intermediate *First Amendment* scrutiny is itself a concession that the provisions implicate expression, because otherwise even intermediate scrutiny would not apply. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006).

The government's next error is to assert that the statute's express *scienter* requirement saves the provisions from vagueness. U.S. Br. 13, 17-18. But the requirement that defendants know the organization they support is a "foreign terrorist organization" does not even speak to the vagueness issue here—namely, what types of speech are proscribed by the advice, training, personnel, and service terms. Moreover, unlike a *scienter* requirement of specific intent to advance terrorist activities, the requirement that one know that a recipient organization is designated neither excludes plaintiffs' proposed peaceful political speech nor radically shrinks the range of uncertain application of the statute to protected speech.

The government also errs in arguing that plaintiffs' use of the challenged terms as shorthand to describe their own activity confirms that the terms are not vague as a legal matter. U.S. Br. 14, 28. The fact that a term is used as a general descriptive matter in the English language does not make it a permissible basis for criminalizing speech. Plaintiffs have consistently maintained that their proposed speech is sufficiently close to what the provisions appear to prohibit to establish standing to sue, but have simultaneously argued that the legal terms themselves are insufficiently clear to satisfy the vagueness doctrine.[1] That plaintiffs did not preface their every reference to their speech with the adjective "apparently" does not defeat their challenge.

The above flaws infect the government's analysis of all four provisions. The government fares no better in defending each provision standing alone.

A. Training

Every judge to have ruled on the "training" prohibition in this case, both before and after Congress amended it, has concluded that it is fatally unclear about what speech is prohibited. Yet the government insists that persons of ordinary intelligence would implicitly understand what none of these federal judges could—namely, the difference between instruction in "specific skills" and instruction in "general knowledge." Everyone knows what is "commonly known," the government maintains, and therefore Congress can make it a crime to make a mistake about the difference between the "general" and the "specific."

Like the distinction between "general" and "elaboration" declared unconstitutionally vague as a standard for bar discipline in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033-34 (1991), the "training" definition rests on an inescapably subjective general-specific distinction. If such a distinction is impermissible even where no criminal sanctions are involved, it is *a fortiori* impermissible where a felony conviction is at stake.

---

[1] *See, e.g.*, Fertig Dec., J.A. 99 (expressing concern that Humanitarian Law Project's speech "would appear to fall within the still-broad definitions of the material-support statute").

The government's attempts to distinguish *Gentile* are unpersuasive. If *Gentile* involved "classic political speech," U.S. Br. 23, so does this case: teaching people to advocate for peace and human rights is at least as "political" as commenting on a criminal case. Moreover, neither *Gentile* nor any other case suggests that vagueness standards apply differently to "classic political speech" and all other protected expression.

The government also contends that, unlike in *Gentile,* the distinction between "general knowledge" and "specific skills" has a "settled usage," U.S. Br. 24. But the best the government can cite for support (U.S. Br. 21, 24) is *Pierce v. Underwood*, 487 U.S. 552 (1988), which (a) presented no vagueness challenge, (b) involved a non-criminal statute, the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, that does not use the terms "general knowledge" or "specific skills," and (c) actually underscores the terms' ambiguity here. In *Pierce*, the Court interpreted an EAJA provision authorizing enhanced attorney fees to require judges to distinguish between cases requiring "general lawyerly knowledge" and those demanding "distinctive knowledge or specialized skill," such as patent law expertise. 487 U.S. at 572. Judicial determination of attorney compensation is a far cry from criminalizing speech, and nothing in *Pierce* suggests otherwise.

In any event, the EAJA standard only underscores the vagueness of the "training" definition as regards plaintiffs' proposed speech. Under EAJA, the litigation of individual rights complaints against the federal government, even when involving complex regulatory schemes, is not generally treated as involving specialized skill warranting increased compensation; and surely the government would not urge otherwise. *See, e.g., Healey v. Leavitt*, 485 F.3d 63, 68-71 (2d Cir. 2007). The EAJA standard would seem to make plaintiffs' proposed human rights instruction "general knowledge" *excluded* from the "training" prohibition—the very opposite of the government's assertion that plaintiffs' proposed speech is prohibited. U.S. Br. 14.

The government cites numerous statutes using the term "training" (U.S. Br. 20 n.2), but not one of them uses the term to separate criminal from non-criminal conduct. Most impose no penalty whatsoever. The government has cited no criminal statute—federal or state—imposing criminal sanctions on speech on the basis of a distinction between the general and the specific.[2]

B. Expert Advice or Assistance

The "expert advice or assistance" prohibition similarly employs terms too uncertain for the present criminal context, leaving plaintiffs to guess whether their speech derives from "scientific, technical, or other specialized" knowledge, or some other unspecified kind of knowledge. The standard's similarity to Federal Rule of Evidence 702 cannot establish its sufficiency here: the Rules of Evidence use many terms—*e.g.*, "more probative than prejudicial," "in the interests of justice," "equivalent circumstantial guarantees of trustworthiness"—that are acceptable for judges making discretionary evidentiary rulings while presiding over trials, but undoubtedly would be vague if imposed on the general public as grounds for criminalizing speech. Different contexts and consequences demand different standards.

---

[2] The Sentencing Guidelines' reference to "special skill" (*see* U.S. Br. 22 n.3) is inapposite. The provision does not separate criminal from non-criminal conduct, but addresses only sentencing. Because convicted defendants have no right to a particular sentence within the legislative range, our legal systems have long permitted highly discretionary sentencing under standards that would be unconstitutionally vague if used to define criminal behavior in the first place. *See United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) ("[T]he Sentencing Guidelines are simply not susceptible to a vagueness attack.").

The "expert advice" definition suffers from the same indeterminacy—for crime-defining purposes—as the general/specific distinction for "training." Is advising on human rights or political advocacy derived from "scientific, technical, or specialized knowledge" (to make it forbidden here) or is it derived from a lawyer's "general knowledge" (the opposite of "specialized" in *Pierce*)? The difficulty of assessing not only what is "specialized" or "technical," but what is "derived from" such knowledge, renders this standard too indeterminate to be a permissible basis for criminalizing speech.

The government sought below to offer comfort by identifying geography as illustrative of a subject within "general knowledge," *see* Pet. Br. 27-28 & n.13, but now warns that a citizen must avoid "geoscience" or "geopolitics." U.S. Br. 24 n.5. Yet the government says nothing about distinctions among physical, economic, cultural, political, and other aspects of geography, leaving one to wonder what facts about a place on the planet are permissible to teach—or whether it matters if the speaker "derived" the information he conveyed from a college class, a high school textbook, an academic journal, or *National Geographic*. The government offers no answer because the provision is fundamentally indeterminate.

The government now proposes that "expert advice" encompasses speech derived from knowledge that is "specific, practical, and related to a particular branch of science or a profession," U.S. Br. 31, or from "knowledge relating to subject matter and based on experiences not usually possessed or shared by the general public." *Id.* at 30. These definitions do not clarify matters. Is advice based on human rights, political advocacy, or peacemaking derived from "specific" and "practical" knowledge? Where does one find a gauge of what knowledge or experiences are "usually" possessed by the "general public"? And even if these questions could be answered, how is a citizen supposed to know that they are the right questions to ask, given that these are not the statute's terms?

The government introduces still further ambiguity by arguing that citizens should be guided by the other forms of aid prohibited in the statute—such as "'false documentation or identification, communications equipment, * * * weapons, lethal substances, [and] explosives.'" U.S. Br. 32 (arguing that this "list demonstrates the types of 'scientific' and 'technical' 'advice or assistance' that concerned Congress"); *id.* at 39 (same argument for "service" prohibition). A citizen seeking to discern the meaning of "expert advice" from the other forms of prohibited support could reasonably conclude that it forbids only advice that furthers a group's violent ends. He could hardly expect that speech with no nexus to violence, and even speech designed to *reduce* resort to violence, would be viewed as "like" providing explosives and lethal substances.

Congress's directive that the statute not be interpreted or applied in a manner that abridges First Amendment rights (§ 2339B(i)) exacerbates this confusion. That provision might reasonably suggest that advice about human rights, which is usually protected speech, is *not* to be treated like "explosives." But the government apparently draws the opposite conclusion. U.S. Br. 14. Alternatively, that provision requires citizens to undertake the complex doctrinal analysis illustrated by the briefs in this case simply to assess whether their speech is permitted or proscribed. Either way, it offers no clarifying guidance to an ordinary person.

C. Service

The government's attempt to defend the prohibition on "service" underscores the provision's vagueness in multiple ways. First, the government offers three dramatically different definitions of "service" in just a few paragraphs. It first contends that the prohibition covers any act done "for the benefit of" a designated group, U.S. Br. 38, then that it might be (much more narrowly) limited to acts done "at the command of" a designated group "to further its goals and objectives," *id.* at 40, and finally that it might encompass services provided at an organization's "behest," *id.* at 41, yet a third concept presumably broader than "command" but narrower than "for the benefit." If the government itself cannot decide, how are plaintiffs to decipher the prohibition's meaning?

Moreover, the two narrowing definitions ("command" and "behest") are so fundamentally at odds with the statute's asserted purpose of halting "aid" to designated groups that few citizens could reasonably rely on them. Would the government really assert that the provision of some valuable non-speech service (such as surveying and mapping a target site) is not a prohibited "service" because it was neither commanded nor requested? The government nowhere explains how any of plaintiffs' proposed activities would be deemed at the behest, much less command, of the LTTE or the PKK, yet it insists that they would all be covered. U.S. Br. 14, 41-42.

Second, in response to plaintiffs' argument that there are internal contradictions between what the "training," "expert advice," and "personnel" provisions expressly do *not* cover—"general knowledge," non-specialized advice, and "entirely independent" activity—and what "service" prohibits, *see* Pet. Br. 38-40, the government advances a new argument, never proposed previously, that the "service" provision should be interpreted to incorporate *sub silentio* all of those exceptions. U.S. Br. 40. The government does not explain how an ordinary citizen should glean this from the face of the statute, particularly when it took the government's own lawyers several years to come up with this reading. In any event, the proposal introduces to the interpretation of "service" *all* of the uncertainty regarding the line between the "general" and the "specific" that infects each of the narrower provisions. *See* Pet. App. 25a. (The same would be true of "personnel," as the same *noscitur a* *sociis* argument would presumably guide interpretation of that term as well.)[3]

Third, in response to plaintiffs' reasonable concern that the "service" ban could bar even independent advocacy done "for the benefit of" a designated organization, the government asserts that because the statute prohibits only the provision of service "to" a designated group, it requires "a direct relationship with the foreign terrorist organization." U.S. Br. 39. A citizen could not remotely rely on that view. Independently acting to benefit someone is not uncommonly labeled rendering a service to him. And the government offers no specification as to what sorts of coordination amounts to a "direct relationship," a term that does not even appear in the statute. Would any communication with any member be sufficient? With a leader? Must the "relationship" have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary? The government's "direct relationship" gloss only further muddies the waters.[4]

Finally, the government asserts that the statute permits plaintiffs to join or associate with designated groups and to communicate freely with the groups and their members (U.S. Br. 37-38, 61), yet simultaneously insists that anything of benefit done in conjunction with a designated group may be a crime. *Id.* at 35, 38. It studiously avoids offering any guidance, however, as to the scope or degree of coordination that transforms protected advocacy into a crime. In short, the scope of "service," left undefined by Congress, remains hopelessly unclear, and plaintiffs are left to fear that anything they do that might benefit the group could trigger a prosecution.[5]

---

[3] The vagueness created by the provisions' interaction is further illustrated by the fact that some of the government-supporting amici take precisely the opposite view, contending that conduct excluded by one provision is prohibited by others. Amicus Br. of Scholars, Attorneys, and Former Public Officials 33.

[4] The statutory word "to," on which the government rests its interpretation, applies not only to "service" but to all material support. Would the government contend that an individual who gave explosives to an intermediary so that the intermediary could give them to a designated organization is not liable under the statute, because he lacked a "direct relationship" with the designated group?

D. Personnel

Plaintiffs' principal vagueness objection to the "personnel" prohibition is that it leaves undefined a vast gray area between "entirely independent" activity, which the provision expressly states does not fall under "personnel," and prohibited action taken under a group's "direction or control." In that vast area are many forms of coordination, leaving plaintiffs deeply uncertain as to what is permissible. Pet. Br. 36-38.

The government maintains that "direction or control" should be understood by reference to "concerted activity" under the Sherman Act § 1. This is the first time in this decade-long litigation that the government has suggested such a reading, even though it now argues that any ordinary citizen should have known it all along. In fact, the concepts appear to be quite different.[6]

---

[5] Another of the government-supporting amicus briefs maintains that to determine whether any speech provided to a designated group is prohibited by any of the four prohibitions, plaintiffs must also determine whether it is "material," which turns on whether the recipient would "value the advice," thus turning the criminal sanction on the hypothesized response of the listener, a position the government has never advanced. Amicus Br. of Maj. Gen. John D. Altenburg, et al. 23-24. Such disagreement about the meaning of the prohibitions further illustrates their vagueness.

Under Section 1 of the Sherman Act, two persons can reach an agreement as equals on a course of conduct without either one acting under the other's "direction or control." The government cites no antitrust decision that makes "direction or control" either a sufficient or a necessary condition of concerted activity: they are different concepts. An agreement is present under antitrust law when two parties merely exchange oral unenforceable promises, even when they are free to walk away at any time, so that neither is under the other's direction or control. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969); 6 Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1404 at 18 (2d ed. 2003). Moreover, proof of direction and control will not always establish an agreement for antitrust purposes. *See Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986) (control by a regulator is insufficient to establish an agreement for Sherman Act purposes); *see also* 6 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 1408 at 39-40 (party's acts motivated by fear of another sometimes, but not always, involve agreement). The antitrust concept of agreement—concerted action—thus appears to have little in common with the

---

[6] Here, too, the government and amici that seek to lend it support offer conflicting readings of the provisions they both insist are so clearly defined. Thus, one amicus brief maintains that "personnel" prohibits the "provision of individuals ready to obey the DFTO's orders" and "ready to do the DFTO's bidding," concepts that seem significantly more demanding than the government's proposed "concerted activity" standard. Amicus Br. of Scholars, *supra*, at 30-31.

"direction or control" required by Section 2339B(h). Indeed, it would be surprising if the government, in its role as antitrust enforcer, would ever agree that, to prove a Section 1 agreement, it had to prove facts showing that one party worked under the other's "direction or control."

That the government had to reach so far to import an inapt notion into Section 2339B(h) this late in the litigation confirms the inherent uncertainty of the statute's language as applied to plaintiffs' speech. Its citation to other federal statutes using the terms "direction or control" do not help, as they involve employment relationships (a concept quite distinct from "concerted action") or regulate underlying conduct that is unlawful independent of the statutorily designated relationship. None of the cited statutes threatens to criminalize otherwise-protected First Amendment activity based solely on varying levels of coordination with a designated group. None creates the problematic gray area presented here by carving out "entirely independent" activity. And none of the statutes has been read, as the government now suggests the "personnel" provision here should be read, to encompass all "concerted activity."[7]

---

[7] The only two criminal statutes the government cites that use "direction or control" are manifestly different. The first, 18 U.S.C. § 175b(d)(2)(G), prohibits possession by "restricted persons" of certain biological agents, and defines "restricted persons" to include, *inter alia*, "an alien who . . . acts for or on behalf of, or operates subject to the direction or control of, a government or official of a country described in this subparagraph." The underlying prohibition on possessing biological agents has no nexus to protected speech, and thus need not satisfy heightened vagueness standards. The second, 18 U.S.C.

E. The Provisions Are Invalid on Their Face

The government erroneously asserts that plaintiffs "do not challenge the statute on its face." U.S. Br. 18. In fact, plaintiffs expressly argued that the four challenged provisions are so profoundly indeterminate that they are facially overbroad as well as vague. Pet. Br. 42-43, relying on *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). The many examples of how these provisions interfere with the work of peace groups such as the Carter Center,

---

§ 951, requires "agents" of foreign governments to register, and defines "agent of a foreign government" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. § 951(d). That statute, unlike this one, invokes a traditional agency relationship, and does not purport to encompass all concerted activity, or to carve out only "entirely independent activity."

None of the lower court decisions that have rejected vagueness challenges to the "personnel" prohibition in Section 2339B involved the type of loosely coordinated speech in which plaintiffs seek to engage. Rather, they involved nonspeech conduct and either an employment or command-and-control relationship. *See United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 182 (E.D.N.Y. 2008) (defendant created an "employment relationship" with designated group); *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (defendant allowed himself "to be indoctrinated and train[ed]" with weapons in an Al Qaeda training camp); *United States v. Lindh*, 212 F. Supp. 2d 541, 545-46 (E.D.Va. 2002) (defendant fought in Taliban unit and received military training under Al Qaeda). In the only case involving a more ambiguous relationship, the court found that while the "personnel" provision was not vague as applied to the receipt of training in an Al Qaeda terrorist training camp, the provision was vague as applied to "allegations that [the defendant] remained in communications with Al Qaeda associates after he returned to Canada." *United States v. Warsame*, 537 F. Supp. 2d 1005, 1010 (D. Minn. 2008).

Christian Peacemaker Teams, and the International Crisis Group illustrate the real-world implications of this facial vagueness and overbreadth. *See* Amicus Br. of Carter Center, et al. 12-28.

The government's contention that the court of appeals confused the vagueness and overbreadth doctrines (U.S. Br. 42-43) ignores this Court's own linking of the doctrines when vague statutes implicate speech—not only in *Williams*, but elsewhere. *See Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (statute facially invalid because it is "unconstitutionally vague in its overly broad scope" and "would allow persons to be punished merely for peacefully expressing unpopular views"); *Village of Hoffman Estates*, 455 U.S. at 494 (heightened vagueness standard applies where statute implicates free speech).

In sum, the problem here is not that one can hypothesize close cases that are difficult to decide, but that the statutory standards themselves are too indeterminate for the imposition of criminal penalties on speech. They leave plaintiffs and others in the dark as to what level of coordination will constitute a service or personnel, what speech is derived from "specialized knowledge," imparts a "specific skill," or constitutes "general knowledge," what renders advocacy "independent," and how the provisions interact with each other and with the rest of the statute.[8]

---

[8] One of the government-supporting amicus briefs argues that the vagueness of the statute is mitigated by the opportunity to apply for a license for certain limited legal services. Amicus Br. of Scholars, *supra*, at 24-28 (citing 31 C.F.R. § 597.505(a)). But that regulation has a limited reach, focused on very specific legal services, and would not cover the types of advice, training, and service that HLP seeks to provide to the

II. THE CHALLENGED PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY IMPOSE CONTENT-BASED PROHIBITIONS ON SPEECH BASED ON ITS COMMUNICATIVE IMPACT

Despite the fact that the provisions as applied here criminalize pure political speech on the basis of its content, the government contends that only *O'Brien* intermediate scrutiny is warranted because the challenged provisions are part of a general regulation of conduct—assertedly aimed at preventing "aid" to designated organizations—that only incidentally affects expression. But *O'Brien* is inapplicable here, because it is limited to *content-neutral* statutes that, as applied, regulate the *noncommunicative* aspect of expressive conduct. In any event, the government's attempt to criminalize plaintiffs' proposed advocacy of human rights, peacemaking, and other lawful activities, cannot survive even intermediate scrutiny.

A. *O'Brien* Does Not Apply to Provisions That Criminalize Pure Speech Based on Its Communicative Impact.

In *O'Brien*, this Court held that where a law regulates conduct on a content-neutral basis, its regulation of the "nonspeech element" of expressive conduct is constitutional if the government can establish that

---

PKK. In any event, as the government tacitly acknowledges by not making this argument, a constitutionally vague statute is not saved by inclusion of a licensing provision that effectively acts as a prior restraint. *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *see also Citizens United v. FEC*, No. 08-205, slip op. 18-19 (U.S. Jan. 21, 2010).

it furthers a "substantial government interest" that is "unrelated to the suppression of free expression" and that the restriction on expression is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 376, 377.

The Court subsequently established, in *Texas v. Johnson*, 491 U.S. 397 (1989), that in order for *O'Brien*'s intermediate scrutiny to apply at all, the government's interest in regulating must be unrelated to the conduct's expressive element, or "communicative impact." *Id.* at 411 & n.8; *see id.* at 407 ("[W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression'") (quoting *O'Brien*, 301 U.S. at 377). The Court explained: "the communicative nature of conduct [is] an inadequate *basis* for singling out that conduct for proscription." *Id.* at 406 (emphasis in original). Accordingly, "a law *directed at* the communicative nature of conduct must, like a law directed as speech itself, be justified by the substantial showing of need that the First Amendment requires." *Id.* (emphasis in original).

The *Johnson* Court held that the state's interest in preserving the flag as a symbol of nationhood and national unity, *as applied to Johnson's conduct*, 491 U.S. at 403 n.3, was related to the suppression of expression, because the only way Johnson's flagburning could undermine that interest was by virtue of what it expressed, *i.e.*, through its communicative impact. Accordingly, the Court treated it as a content-based regulation of speech and applied strict scrutiny. *Id.* at 410-20.

Where, as here, the state seeks to criminalize not conduct, but pure speech, *O'Brien* is even more clearly inapplicable. Thus, in *Cohen v. California,* 403 U.S. 15, 18 (1971), the Court held *O'Brien* inapplicable to an otherwise-valid breach-of-the-peace law when applied to penalize pure speech:

> The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct.

Id. (emphasis in original) (internal citation removed); *see also Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 495 (1975) (same); Pet. Br. 61-62.

As in *Cohen,* so here, the only "conduct" the challenged provisions would penalize, as applied, is "the fact of communication." There is literally no "nonspeech element" or "noncommunicative conduct" being regulated. In this respect, this case is analogous to *Street v. New York,* 394 U.S. 576 (1969), which involved a statute barring both flagburning and "cast[ing] contempt upon [it] by words." *Id.* at 578. Without questioning the validity of the flagburning prohibition, the Court overturned the conviction because Street may have been convicted for his words. *Id.* at 590-94. Here, as in *Street,* some parts of the statute apply to conduct. But as applied, the challenged provisions criminalize only words—indeed, "political speech," which "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United,* slip op. 23. Strict scrutiny applies. *Id.*, slip op. 33 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

As in both *Johnson* and *Cohen*, the government's interest is necessarily "related to the suppression of expression." The government claims that it seeks to deny "aid" to designated groups, whatever form that aid takes, and therefore its interest is not related to expression. But the only way that plaintiffs' speech can possibly "aid" the PKK or the LTTE is by virtue of what it communicates, either to their members or to non-members, and thus the government's interest in preventing *that* "aid" is necessarily an interest in suppressing expression. Similarly, in *Cohen*, the state's general interest was in averting breaches of the peace, but as applied to Cohen that interest was "related to the suppression of expression," because the only way the words on Cohen's jacket could have disrupted the peace was by virtue of what they communicated.[9] *Cohen*, 403 U.S. at 18.

One simply cannot separate out preventing "aid" as an expression-independent interest for the statute's application here, because the only "aid" plaintiffs propose to provide is 100 percent speech. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones*, 90

---

[9] *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975) ("The reference of *O'Brien*'s second criterion is therefore not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts.").

Cornell L. Rev. 1277, 1284 (2005) ("[W]hen a generally applicable law is content-based *as applied*—when speech triggers the law because of the harms that may flow from what the speech says—the law should be subject to full-fledged First Amendment scrutiny.") (emphasis in original).[10]

A law that banned all conduct "that interfered with the draft" could not be defended under *O'Brien as applied to an anti-draft speech*. As applied, the law would not be regulating any "nonspeech element," and the government's interest would not be "unrelated to the suppression of expression." Such a prosecution, as in *Street* and *Cohen*, would properly be viewed as a regulation of *speech* based on its communicative impact, and would trigger strict scrutiny. So too here.

The government's interest in the suppression of expression is further underscored by its assertion that it seeks to penalize even advocacy of lawful, peaceable activity because such advocacy might lend "legitimacy" and "good will" to designated groups. *See infra* pp. 34-35 (quoting government briefs). This interest, articulated by counsel below as a desire to make proscribed groups "radioactive," is directly and necessarily related to the suppression of expression, because only speech that expresses a message of legitimacy will even potentially implicate the government's interest.

---

[10] At times, the government seems to deny that the statute penalizes speech at all: it maintains that the statute "does not target expression at all," U.S. Br. 46; that "Sections 2339A and 2339B say nothing about speech," *id.*; and that the statute does not regulate "speakers attempting to reach particular audiences," *id.* at 50. This is false both on its face and as applied. Prohibitions on "advice" and "training" are nothing if not a regulation of speech. And as applied here, the government concedes the provisions criminalize such core speech as lobbying Congress or writing amicus briefs, as well as teaching or advising "particular audiences." As the Solicitor General wrote when an academic, this conflation of speech and conduct renders the doctrine incoherent: "For a court to . . . classify an explicit speech-directed action as 'incidental' whenever it can be conceptualized as a component of a broader, nonspeech prohibition would subvert the very basis of the doctrine [of incidental restraints]." Elena Kagan, *When A Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. Davis L. Rev. 957, 961-62 (1996).

The government's reliance on *United States v. Albertini*, 472 U.S. 675 (1985), U.S. Br. 46, 52, is misplaced, because there the government's regulation of conduct was unrelated to expression. *Albertini* upheld a conviction for violating an order barring entry to a military base. The order barred the *conduct* of re-entry for any reason, and therefore the government's interest was in prohibiting the noncommunicative aspect (the physical entry) and not in suppressing whatever communication Albertini desired to express once on the base. *Albertini*, 472 U.S. at 685-86. Here, by contrast, the provisions criminalize pure speech because of what it communicates.

The government argues that the provisions at issue can be likened to other criminal offenses that "usually are accomplished through the use of words," such as conspiracy, fraud, bribery, and extortion. U.S. Br. 46. But those laws prohibit only speech that is specifically intended to further, and inextricably intertwined with, independently unlawful conduct, or that is itself unprotected. None of those laws prohibits speech advocating lawful, nonviolent activity. A conspiracy conviction requires proof of an agreement to engage in some distinct criminal conduct.

Fraud is an intentional falsehood causing personal harm (by transfer of money or otherwise). Bribery involves the act of providing money or other things of value in exchange for official action. Extortion involves use or threats of force, violence, fear, or official power to obtain property. Such "long-established criminal proscriptions," *Williams*, 128 S. Ct. at 1841-42, involve features wholly missing here.[11] Section 2339B's novel and sweeping prohibitions prevent plaintiffs from engaging in speech that does not intend to induce any independently illicit activity or involve any intentional falsehoods or threats.

Were the Court to accept the government's invitation to apply *O'Brien*'s more relaxed scrutiny to laws that criminalize pure speech based on its communicative impact merely because they also regulate conduct in other provisions or applications, First Amendment doctrine would need to be radically revised. The Court has reversed numerous convictions for protected speech and assembly under facially content-neutral "breach of the peace" and "disorderly conduct" laws.[12] In these cases, the Court generally did not question the facial validity of the laws, which did not target speech. But the Court nonetheless repeatedly reversed convictions on the ground that the statutes were unconstitutional *as applied* to peaceable speech and assembly. As the Court stated in *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940), a "breach of the peace" law legitimately "embraces a great variety of conduct," including "violent acts," but is unconstitutional as applied to a conviction for speech because of "the effect of [the speaker's] communication upon his hearers." *Id.* at 309.

---

[11] This Court has described categories of speech like conspiracy and fraud as unprotected, not even triggering *O'Brien* scrutiny. *Williams*, 128 S. Ct. at 1841-43. The government's concession that at a minimum *O'Brien* applies here thus undermines its asserted analogy to conspiracy, fraud, and the like.

[12] *See, e.g., Cohen v. California, supra*; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969); *Cox v. Louisiana*, 379 U.S. 536, 545-52 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940).

Similarly, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court did not question the validity of the criminal syndicalism statute on its face, but struck down its particular application because, as applied, it criminalized pure speech and "peaceable assembly." *Id.* at 365; *see also* Pet. Br. 53-54, 57-58. And in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982), the Court invalidated a tort judgment using strict First Amendment scrutiny where a facially neutral business-interference tort cause of action, which legitimately encompassed a wide range of conduct, was applied to hold the organizers of a boycott liable for their speech and association. Under the government's approach, all of these cases should have triggered only *O'Brien* scrutiny, because they criminalized speech pursuant to an otherwise facially valid regulation of conduct. But when such laws were applied to penalize pure speech, this Court subjected the applications to strict, not intermediate, scrutiny. *See* Volokh, *Speech as Conduct*, 90 Cornell L. Rev. at 1286-93. The Court should do the same here.

B. *O'Brien* Does Not Apply Because the Challenged Provisions Are Not Content-Neutral.

O'Brien is also inapplicable for the separate reason that the challenged provisions are content-based on their face. Recognizing that *O'Brien*'s scrutiny is limited to content-neutral statutes, the government repeatedly insists that the provisions here are content-neutral. *See, e.g.*, U.S. Br. 45 ("2339B does not target expression at all, let alone expression of a certain content or viewpoint"); *id.* at 46 ("Sections 2339A and 2339B say nothing about speech, much less about the content of any speaker's message"); *id.* at 47 ("the statute's aim is not the content or viewpoint of the speech"). But no matter how often the government repeats them, these claims cannot be squared with the language of the statute itself.

As the government agrees, whether a statute is content-based or content-neutral "'is something that can be determined on the face of it; if the statute describes speech by content then it is content-based.'" U.S. Br. 46 (quoting *City of Los Anegeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)). Here, the statute is nakedly content-based in several respects.

The statute entirely exempts the provision of religious materials. It is as if the law in *O'Brien* banned draft card burning, except for religious purposes. Statutes that distinguish religious and nonreligious expression are content-based, and in some settings even viewpoint-based. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 830-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). The government's only defense of this expressly content-based distinction is a footnote that merely quotes the court of appeals' assertion that Congress "is entitled to strike such delicate balances." U.S. Br. 51 n.11. But that assertion does not dispute that the "religious materials" exemption is content-based. And when the government discriminates on the basis of content, it is not enough merely to assert that it is a "delicate balance," even when foreign policy is implicated; the government bears the heavy burden of satisfying strict scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988). The government has made no attempt to explain what compelling government interest made it necessary to exempt the provision of unlimited religious materials to designated foreign terrorist organizations—even materials calling for violent jihad—while criminalizing advocacy of peace and human rights.

In addition, the "training" and "expert advice" provisions both "describe[] speech by content." Speech whose content instructs in "general knowledge" is permissible; speech whose content conveys "specific skills" or is "derived from . . . specialized knowledge" is proscribed. And according to the government, the same content distinction applies to "service" and "personnel." U.S. Br. 40. It is not just, as the government says in a striking understatement, that training and advice "usually are accomplished through the use of words." U.S. Br. 46. The statute expressly defines prohibited and permitted speech by reference to its content, and plaintiffs cannot determine whether their speech is prohibited except by reference to its content.

Quoting *Hill v. Colorado*, 530 U.S. 703, 721 (2000), the government argues that it is not improper "'to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.'" U.S. Br. 51. But as previously explained, Pet. Br. 50 n.27, the Court treated the regulation in *Hill* as a content-neutral "time, place, and manner" restriction on all "picketing," which simply restricted the place at which the speech could occur and did not "accord[] preferential treatment to expression concerning one subject matter," 530 U.S. at 722. Here, the government concedes that the statute is not a time, place, or manner restriction, U.S. Br. 49, and does not deny that it discriminates in favor of speech that addresses religious or "general knowledge" subjects, totally barring the non-preferred speech "to" the disfavored listener at any time or place, or in any manner.

Thus, because the challenged provisions, as applied here, regulate plaintiffs' pure speech based on its communicative impact, because the government's asserted interest is precisely in "the suppression of expression" that aids designated groups, and because the provisions expressly discriminate on the basis of content, *O'Brien*'s intermediate scrutiny is inapplicable. Rather, "we are outside of *O'Brien*'s test, and we must ask whether th[e government's] interest justifies [criminalizing plaintiffs' proposed speech] under a more demanding standard." *Texas v. Johnson*, 491 U.S. at 403. But the government nowhere even tries to defend the measures at issue here under strict scrutiny.

C. The Provisions Cannot Survive Even Intermediate Scrutiny

The nature of the speech at issue here makes the provisions invalid as applied no matter what standard of review governs. When peaceful protected speech or advocacy of lawful activities is involved, the Court has repeatedly rejected government justifications for criminalization as insufficient, whether the government seeks to deny aid to the Communist

Party, *De Jonge*, *supra*; to secure peace and safety during war, *Taylor v. Mississippi*, 319 U.S. 583 (1943); to protect children from sexual exploitation, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); to limit the exposure of confidential communications to the public, *Bartnicki v. Vopper*, 532 U.S. 514 (2001); or to prevent a breach of the peace, *Cox*, *supra*; *Gregory*, *supra*. The government has not cited a single decision of this Court upholding a law that criminalized peaceable speech or advocacy of lawful activities, under any standard of review.

Even if this Court were to conclude that the government's interest in criminalizing the specific speech at issue is "unrelated to the suppression of expression"—which it should not, *see* II.A., *supra*; Pet. Br. 62, 65—application of the provisions here would fall under *O'Brien*. The government cannot establish that criminalizing plaintiffs' proposed speech restricts expression no more than is necessary to further the government's interests.

In this as-applied challenge, the government's burden is to justify criminalizing *plaintiffs' specific speech*, not the statute in general. In *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), for example, this Court entertained a pre-enforcement as-applied challenge to § 203 of the Bipartisan Campaign Reform Act (BCRA), even though the Court had previously upheld that very provision as facially valid. As the Court explained, "[t]hese cases, however, present the separate question whether § 203 may be constitutionally applied to these specific ads . . . the Government must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 464.[13] Thus, the First Amendment question presented here is not whether Section 2339B is generally valid, nor whether the four challenged provisions are valid in other applications, but only whether the provisions are valid *as applied to plaintiffs' specific proposed speech.*[14]

Moreover, as demonstrated by this Court's detailed examination of evidence in *Turner Broadcasting Sys., Inc. v. FCC,* 520 U.S. 180 (1997), it is not enough merely to *assert* interests in the abstract. Rather, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and meaningful way." *Turner Broadcasting Systems, Inc. v. FCC,* 512 U.S. 622, 664 (1994). Thus, the government must demonstrate here that the criminalization of plaintiffs' speech about lawful, peaceable activity is in fact necessary to further its legitimate interests. This it has failed to do.

First, the government cites a congressional finding that terrorist organizations are so "tainted by their criminal conduct that any contribution to such an organization facilitates such conduct." AEDPA, § 301(a)(7), 110 Stat. 1247; U.S. Br. 54. But even if such a generic statement were acceptable as a factual finding in a First Amendment case,[15] it is limited to "contributions," not speech. Congress made no finding that speech advocating lawful activities has that effect; to the contrary, Congress expressly directed that Section 2339B not be interpreted or applied to abridge free speech or association. 18 U.S.C. § 2339B(i).

---

[13] *See also Greater New Orleans Broadcasting Ass'n, Inc., v. United States,* 527 U.S. 173 (1999) (as-applied First Amendment analysis); *U.S. v. National Treasury Employees Union,* 513 U.S. 454 (1995) (same).

[14] The government and government-supporting amici devote much of their argument to defending other aspects and applications of the statute, which do regulate conduct. But plaintiffs do not challenge other provisions or applications here. To be clear, plaintiffs do not concede that all the statute's other provisions are constitutionally valid, as the government erroneously asserts. U.S. Br. 56 (citing Pet. Br. 55). Plaintiffs have made no such concession. Plaintiffs have simply narrowed their challenge in this Court, not pressing here their original challenge to the ban on providing monetary support that furthered only humanitarian interests.

The government also cites a House Report, U.S. Br. 55, but that Report also speaks in terms of "contributions," not speech. H.R. Rep. 104-383, at 45 (1995). In fact, the Report expressly states that the statute preserved "one's right to think, speak, or opine *in concert with, or on behalf of, such an organization.*" *Id.* at 44 (emphasis added). The government below seemed to recognize the intended distinction, citing this language as speech protective and asserting that "Congress noted that the statutory ban 'only affects one's contribution of financial or material resources.'" *See* Pet. Br. 7 (quoting government brief in court of appeals). Notably, the House Report insisted that the statute protected advocacy conducted "in concert" with a designated group (H.R. Rep. 104-383, at 45), directly contrary to what the government seeks to justify here. Thus, neither the House Report nor the congressional finding embodies a determination that speech advocating peaceable activities poses any problem, much less furthers terrorism.

---

[15] *Cf. Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-11 (1984) (appellate courts have independent obligation to assess facts where First Amendment freedoms are at stake).

Nor does the government's rationale for how financial contributions aid terrorism—that money can be commingled with other funds and redirected toward illegal purposes even if donated for a lawful end (U.S. Br. 54-55)—apply to plaintiffs' speech. Human rights advocacy training and peacemaking are not fungible like money. The government identifies no illegal use to which any of plaintiffs' proposed speech could plausibly be put, nor any evidence that such speech has ever been used to further terrorism or any other illegal conduct in the past.

The government contends that plaintiffs' speech might "free up" other resources that the PKK and the LTTE would then be able to devote to terrorism. U.S. Br. 56. This ground, not invoked by Congress and never before held constitutionally sufficient to prohibit speech, is dangerously broad; indeed, the same could be said of independent advocacy and provision of religious materials, both left unproscribed. In order to establish that plaintiffs' proposed training in human rights advocacy and peacemaking would "facilitate" criminal conduct in this way, the government would have to show that terrorist groups, in the absence of such support, would have spent their own resources to obtain such training. The government provides no evidence to support that supposition.

Finally, the government argues that even if human rights training cannot be used to support terrorism directly, and even if it will not free up other resources to spend on terrorism, it may nonetheless "bolster" the organization's "efficacy and strength in a community, thus undermining this nation's efforts to delegitimize and weaken these groups." U.S. Br.

56; *see also* Third Cross-Appeal Br. for Appellants 42 (C.A., filed July 12, 2006) ("even non-fungible support confined to humanitarian purposes causes harm by increasing the terrorist group's good will, recruiting, and image of legitimacy.") This rationale, which government counsel below articulated as an interest in making designated groups "radioactive" that justified prohibiting even the filing of amicus briefs, *see* Pet. Br. 49 n.26, is an invalid interest under the First Amendment, because it seeks to suppress a particular message—namely, that groups the United States disfavors are "legitimate."

This is essentially the same interest held insufficient to justify laws penalizing Communist Party membership. This Court never questioned Congress's detailed findings that the Communist Party was part of an international conspiracy using terrorism and other illegal methods to overthrow the United States by force and violence. The government argued that active association would inevitably support the organization's illegal ends.[16] This Court, however, repeatedly insisted that laws must carefully distinguish between those who associated with the Communist Party to further its legal ends and those who did so to further its illegal ends. The government's interest in "delegitimizing" the PKK by the means at issue here—prohibiting plaintiffs from advocating in cooperation with it and urging it to use human rights and peacemaking tools—is equally impermissible.

---

[16] In *Scales v. United States*, the United States argued that "knowingly joining an organization with illegal objectives contributes to the attainment of these objectives because of the support given by membership itself." U.S. Br. on Reargument at *8, *Scales v. United States*, 367 U.S. 203 (1961) (No. 1), 1959 WL 101542; *id.* at *11 ("Membership in an organization renders aid and encouragement to the organization") (quoting *Frankfeld v. United States*, 198 F.2d 679, 683-84 (4th Cir. 1952)); *id.* at *22-*23 (active membership can be proscribed "even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes").

III. THE CHALLENGED PROVISIONS VIOLATE PLAINTIFFS' RIGHT OF ASSOCIATION

For related reasons, the challenged provisions independently violate plaintiffs' right of association. By effectively outlawing all "concerted activity," the services and personnel provisions penalize virtually *anything* one might do in association with a designated group, even if, like De Jonge, one is engaged solely in peaceable advocacy and assembly. And they impose criminal penalties on speech based on the disfavored identity of the organization with which it is coordinated.[17] By acknowledging that plaintiffs' speech and advocacy is protected if engaged in independently of a designated group, U.S. Br. 14, but a crime if cooperation with the group is involved, the government admits that what the statute prohibits is association.

---

[17] The government contends that plaintiffs have abandoned their due process "guilt by association" argument, U.S. Br. 62, despite their having specifically preserved it, Pet. Br. 43 n.23, and having devoted a section of their brief to the claim that the statute impermissibly criminalizes plaintiffs' speech based on association. Pet. Br. 56-59. Since both due process and the First Amendment prohibit guilt by association, and plaintiffs have expressly argued that the statute violates the right of association by imposing criminal liability, the argument is squarely presented.

The government concedes that *De Jonge* establishes that "peaceable assembly for lawful discussion cannot be made a crime." *De Jonge*, 299 U.S. at 365; U.S. Br. 61. But it insists that Section 2339B "does not prevent [plaintiffs] from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services." U.S. Br. 61. This is circular: the government simply redefines "peaceably assembling with members of the PKK and LTTE for lawful discussion" of human rights advocacy and peacemaking as a "service." To define "peaceable discussion" as a "service" does not eliminate the First Amendment violation, any more than Oregon's labeling of De Jonge's "peaceable discussion" as "criminal syndicalism" did. The government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).[18]

The statute also violates the right of association by hinging criminal punishment on association. The statute permits advising the Palestine Liberation Organization (PLO) on peacemaking, because the PLO, despite its notorious terrorist activities, has not been designated a "foreign terrorist organization." But the very same peacemaking advice is a crime if provided to the PKK. The Communist Party cases establish that the government may not impose penalties on peaceful and otherwise-legitimate association with a group simply because the group engages in illegal activities. *See* Amicus Br. of Victims of McCarthy Era (drawing parallels between the challenged provisions and McCarthy-era laws).

---

[18] The government argues, almost in passing, that plaintiffs' right to associate with foreign entities is less "absolute" than with domestic organizations. U.S. Br. 52. But it offers no response to this Court's holding in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), protecting the right of Americans to receive information from the Communist Party abroad (without registering with the government first), nor to the Court's many cases fully protecting the right of association with the Communist Party, notwithstanding the government's contention that it "was under the firm and direct control of the Communist International and, through it, of the Soviet Union." U.S. Br. at *185, *Dennis v. United States*, 341 U.S. 494 (1951) (No. 336), 1950 WL 78653. The only case the government cites, *DKT Mem'l. Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 295 (D.C. Cir. 1989), held that family planning organizations lacked standing to challenge AID's anti-abortion funding policies.

The government dismisses the Communist Party right of association cases on the ground that those statutes hinged penalties or denials of benefits on membership or association alone, whereas the challenged provisions of Section 2339B penalize not just association, but association plus something more. U.S. Br. 60. But the only "plus" in these as-applied cases is speech advocating lawful, peaceable activities, which makes the provisions *more* invalid, not less.

On the government's theory, Congress could have reenacted every one of the anti-Communist penalties and disabilities that this Court invalidated, simply by penalizing "speaking in cooperation with" instead of "membership in" the Communist Party. In fact, the Court has never defined the right of association so anemically. What is protected is "the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Through the right of association, the Court has protected the right to "peaceably assemble for lawful discussion," *De Jonge, supra*; to solicit members to the Communist Party and circulate literature, *Herndon v. Lowery*, 301 U.S. 242, 245 (1937); to organize a boycott, even where it included substantial acts of violence, *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 907-909; and to litigate for social and political purposes, *NAACP v. Button*, 371 U.S. at 428-30. The right of association is not limited to holding a membership card.

IV. THE COURT CAN AVOID THE CONSTITUTIONAL QUESTIONS PRESENTED BY ADOPTING A SPECIFIC INTENT REQUIREMENT

The Court can avoid all of the above constitutional issues by interpreting the challenged provisions to require proof of intent to further a designated group's terrorist activities when applied to speech. That is the very course this Court took in *Scales v. United States*, 367 U.S. 203 (1967), when confronted with the application of a similarly broadly worded statute penalizing association with the Communist Party.[19] And here, Congress has specifically directed the courts to construe the statute to avoid First Amendment infringements.

---

[19] Contrary to the government's contention (U.S. Br. 62-63), plaintiffs below consistently urged the interpretation they advance now and invoked the "avoidance" canon. *See* Br. for Appellees at 17, *HLP v. Mukasey*, 552 F.3d 916 (9th Cir. 2007) (Nos. 05-56753, 05-56846) ("The constitutional infirmity identified above can be avoided by interpreting the statute to require proof that the donor specifically intended to further the recipient group's illegal activity."); Br. of Appellees at 33, *HLP v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007) (Nos. 05-56753, 05-56846) ("[T]he Court can avoid the constitutional problems identified above if it interprets the statute to incorporate a *mens rea* requirement that the defendant intended to further the designated organization's illegal activities."); Mem. in Supp. of Summ. J. at 13, *HLP v. Gonzales*, 380 F.Supp.2d 1134 (C.D.

The government contends that interpreting the challenged provisions to require proof of specific intent would not avoid resolution of plaintiffs' claims. But that is wrong. If the Court construed the challenged provisions to require specific intent as applied to speech, the injunction against applying the provisions to plaintiffs' proposed speech could be sustained on statutory grounds, and there would be no need to reach plaintiffs' constitutional challenges. That is avoidance, irrespective of whether a specific intent standard would clearly "save" the challenged provisions from all possible future constitutional challenges. U.S. Br. 63. The canon is about *avoiding* constitutional questions, not resolving them. It is enough that the specific intent construction would permit relief on statutory grounds.

The only constitutional issue plaintiffs present that goes beyond their own conduct (which is undisputedly *not* specifically intended to further illegal ends) is their *Williams* claim of overbreadth because the statute is vague in a substantial range of applications. The Court would not need to reach that

---

Cal. 2005) (No. 03-6107 ABC Mcx.) ("The imposition of a specific intent requirement is . . . essential here."). Both lower courts expressly considered this specific-intent issue. Pet. App. 13a-19a; 47a-60a. In any event, the Court has said that it is independently obligated to adopt a statutory construction that avoids constitutional adjudication if it can do so. *See, e.g., Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). It can do so here, without encountering the problems that barred such an approach in *Citizens United v. FEC*, No. 08-205, slip op. 10-12 (U.S. Jan. 21, 2010).

claim if it afforded plaintiffs relief on statutory grounds. And contrary to the government's suggestion, U.S. Br. 63, that claim *would* be answered by a "specific intent" test. As the government recognizes (U.S. Br. 17-18), and as this Court illustrated in *Scales*, 367 U.S. at 221-30, a properly formulated *scienter* requirement can substantially mitigate vagueness problems by so narrowing the potential applications of the statute that there would be nothing of relative significance that is constitutionally protected within its narrow prohibitions. A statute limited to speech intended to further terrorist activity would not apply to a "substantial" amount of protected speech (if any), and hence would avoid overbreadth.

The government argues that the suggested interpretation is not available because Congress rejected it. U.S. Br. 64. But there is no evidence of such a rejection (and given Congress's explicit instruction to avoid First Amendment infringements, the Court should adopt the intent construction unless Congress expressly rejected it). Congress never considered and rejected a requirement, in Section 2339B, that speech be specifically intended to further terrorist activity. In 2004, Congress adopted a requirement that defendants know that the organizations they support are designated or have engaged in terrorist activities, in response to a court of appeals decision holding that such a requirement was constitutionally mandated. *See HLP v. U.S. Dep't of Justice*, 352 F.3d 382, 393-94 (9th Cir. 2003). But adopting a general knowledge requirement with respect to the identity of a beneficiary for all the statutory prohibitions is not inconsistent with a narrow "specific intent" requirement applicable only where the statute criminalizes speech. Indeed, as plaintiffs explained in their opening brief, Pet. Br. 67-68, in *Scales* this Court interpreted a statute to require proof of specific intent where Congress had expressly required only "knowing" support. *Scales*, 367 U.S. at 219-24.

The government suggests that Congress must have rejected a specific intent requirement for Section 2339B because it adopted one for Sections 2339A and 2339C. U.S. Br. 64-65. But those provisions do not require specific intent; they permit punishment where an individual knowingly *or* intentionally provides aid to a terrorist act. And the context those provisions address is different: they do not pose the same First and Fifth Amendment concerns as the provisions challenged here, because they are limited to support of specified terrorist acts, rather than organizations more generally. Finally, that Congress did not expressly impose a "specific intent" requirement on *all* forms of "material support" in Section 2339B hardly means that it would flout congressional intent to adopt such a requirement when Section 2339B applies to pure speech. Congress expressly directed the courts to construe Section 2339B to avoid infringement of speech and association rights. The Court in *Scales* has already shown how to do that.

V. GRANTING PLAINTIFFS RELIEF WILL NOT IMPEDE THE GOVERNMENT'S LEGITIMATE INTERESTS IN NATIONAL SECURITY

The government sweepingly invokes national security, calling Section 2339B "one of this nation's most valuable and vital tools in the fight against international terrorism." U.S. Br. 16. Amici make similar claims for Section 2339B generally. But what amici, and the government, never do is explain in any persuasive way how tolerating *plaintiffs' proposed speech* will undermine the security of the United States.

There is simply no good reason to think that U.S. security will be endangered if Judge Fertig and the Humanitarian Law Project are permitted to help the PKK learn to bring human rights complaints in Geneva, to assist it in efforts toward peaceful resolution of its disputes with the Turkish government, or to work with it in advocating for legal reforms at the United Nations and in Congress. Just as in *De Jonge*, where the Court found no evidence that tolerating peaceable advocacy of the Communist Party's lawful activities would further criminal syndicalism, or in *Cox v. Louisiana*, where the Court held that peaceable civil rights protests would not undermine the peace and security of Louisiana, so here, there is no reason to believe that plaintiffs' speech will threaten U.S. security. The government and amici dismiss such a determination as a policy disagreement with Congress, but it is not. Rather, it is the Court's duty, in as-applied challenges to laws regulating speech and association, to invalidate the statute as applied if the government cannot meet its constitutional burden of justification.

Protecting plaintiffs' speech will leave the government with fully adequate tools to address threats to our national security. A decision declaring the four challenged provisions invalid as applied to plaintiffs' proposed speech would leave the entirety of Section 2339B available for enforcement against all conduct that is not protected speech, along with a host of related statutes criminalizing support of terrorist activity. While it insists that plaintiffs' speech must be prohibited, the government has not been able to cite *a single case* in which it has used the statute to prosecute anyone for the kind of speech plaintiffs propose here. The empirical record of use of the statute does not justify the claim of need the government must support to prevail here. *See Citizens United*, slip op. 10 ("First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'").

CONCLUSION

All four provisions should be held invalid or, alternatively, read to require intent to further terrorist activity, as applied here. The judgment of the court of appeals should be affirmed with respect to the provisions held invalid and reversed with respect to the provisions upheld.

Dated: January 21, 2010

Respectfully submitted,

DAVID D. COLE
Counsel of Record
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

SHAYANA KADIDAL
JULES LOBEL
JOSHUA M. ROSENTHAL
Center for Constitutional Rights
666 Broadway, 7th floor

New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South #14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow,
Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN
RUDRAKUMARAN
875 Avenue of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents (08-1498)
and Cross-Petitioners (09-89)

REPLY
BRIEF

⑱ ⑰

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL.,
CROSS-PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENTS

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov

[illegible] 0: 1:8

TABLE OF CONTENTS

Page

I. The material-support statute's restrictions on providing aid to known terrorist organizations do not violate the Fifth Amendment 1
  A. The court of appeals confused the vagueness and overbreadth doctrines 1
  B. The statute's terms are sufficiently clear to provide notice to persons of ordinary intelligence 3
    1. Instructing the PKK and LTTE on how to engage in international political advocacy constitutes "training" 6
    2. Consulting with the PKK and LTTE on international law, medical care, and economic development constitutes "expert advice or assistance" 13
    3. Providing persons to work under the direction or control of the PKK and LTTE constitutes "personnel" 17
    4. Helping the PKK and LTTE appear before national and international representative bodies constitutes "services" 22
II. The material-support statute's restrictions on providing aid to known terrorist organizations do not violate the First Amendment 26
  A. The statute is a regulation of conduct that only incidentally and permissibly affects expression 27
    1. As a facially neutral regulation of conduct, Section 2339B may impose an incidental burden on speech 27

2. Section 2339B is not a content-based restriction on speech 33

3. Section 2339B is narrowly tailored to advance the important governmental interest in preventing aid to terrorists 35

B. The statute does not infringe petitioners' right of association 38

III. The material-support statute's restrictions on providing aid do not require specific intent to further the terrorist organization's unlawful activities 42

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Bd. of Educ.*, 431 U.S 209 (1977) 14

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382 (1950) 13

Blakely v. *Washington*, 542 U.S. 296 (2004) 9

Boim v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009) 30

City Council of L.A. v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 28

City of L.A. v. *Alameda Books, Inc.*, 535 U.S. 425 (2002) 33

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 29, 35

Clark v. *Martinez*, 543 U.S. 371 (2005) 43, 44

Cohen v. *California*, 403 U.S. 15 (1971) 32

Connally v. *General Constr. Co.*, 269 U.S. 385 (1926) . . 6, 16

Cases—Continued: Page

Cox v. *Louisiana*, 379 U.S. 536 (1965) 2
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 41
De Jonge v. *Oregon*, 299 U.S. 353 (1937) 39, 40
Fisher v. *City of Berkeley*, 475 U.S. 260 (1986) 19
Gentile v. *State Bar*, 501 U.S. 1030 (1991) 12, 13
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490
(1949) 32
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) . . 9, 24, 25
Haig v. *Agee*, 453 U.S. 280 (1981) 37
Harris v. *United States*, 536 U.S. 545 (2002) 25
Hill v. *Colorado*, 530 U.S. 703 (2000) 5, 33
Humanitarian Law Project v. *Reno*,
205 F.3d 1130 (9th Cir. 2000), cert. denied,
532 U.S. 904 (2001) 37, 38, 39
Humanitarian Law Project v. *United States*
Dep't of Justice, 352 F.3d 382 (2003) 9
Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525
(2001) 28, 29
NAACP v. *Button*, 371 U.S. 415 (1963) . . . .
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) 29
Northwest Austin Mun. Util. Dist. No. One v.
Holder, 129 S. Ct. 2504 (2009) 26
Pierce v. *Underwood*, 487 U.S. 552 (1988) 11, 12
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 28, 31
Regan v. *Wald*, 468 U.S. 222 (1984) 37, 40, 41
Reno v. *ACLU*, 521 U.S. 844 (1997) 13
Rumsfeld v. *Forum for Academic & Institutional*
Rights, Inc., 547 U.S. 47 (2006) 31, 32

Cases—Continued: Page

Scales v. *United States*, 367 U.S. 203 (1961) 10, 11

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 42

Smith v. *Goguen*, 415 U.S. 566 (1974) 3, 4

Texas v. *Johnson*, 491 U.S. 397 (1989) 4, 30

Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 2, 8, 36

Turner Broad. Sys., Inc v. *FCC*, 512 U.S. 622 (1994) 2, 8, 36

United States v. *Albertini*, 472 U.S. 675 (1985) 27, 34, 35, 44

United States v. *Eichman*, 496 U.S. 310 (1990) 36

United States ex rel. the Att'y Gen. of the United States v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 25

United States v. *O'Brien*, 391 U.S. 367 (1968) 27, 37

United States v. *Ramsey*, 431 U.S. 606 (1977) 40

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 24

United States v. *Williams*, 128 S. Ct. 1830 (2008) 2, 13, 16, 18, 19, 25

Veterans & Reservists for Peace in Vietnam v. *Regional Comm'r of Customs*, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972) 40

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 2, 4, 18, 24

Virginia v. *Hicks*, 539 U.S. 113 (2003) 26

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 29

Wayte v. *United States*, 470 U.S. 598 (1985) 28

Cases—Continued: Page

Zemel v. *Rusk*, 381 U.S. 1 (1965) 40, 41

Zicarelli v. *New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972) 6

Constitution, statutes and rule:

U.S. Const.:

Amend. I . . . . *passim*

Amend. V 2, 11, 20, 40, 42

Due Process Clause 42

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247 36

Equal Access to Justice Act, 28 U.S.C. 2412(d)(2)(A)(ii) 11

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(c), 118 Stat. 3762 9

Smith Act, 18 U.S.C. 2385 10

8 U.S.C. 175 20

8 U.S.C. 1182(a)(3)(B)(iv)(VI) 8

18 U.S.C. 175b(d)(2)(G) 19

18 U.S.C. 225(a)(1) 21

18 U.S.C. 951(d) 19, 20, 21

18 U.S.C. 1169(b)(1) 19

18 U.S.C. 1960(a) 19

18 U.S.C. 2339A 44

18 U.S.C. 2339A(b)(1) 4, 17, 23, 34

18 U.S.C. 2339A(b)(2) 7, 9

18 U.S.C. 2339A(b)(3) 14

Statutes and rule—Continued: Page

18 U.S.C. 2339B .... *passim*
18 U.S.C. 2339B(a)(1) 4, 20, 23
18 U.S.C. 2339B(h) 18, 19, 21
18 U.S.C. 2339C 44
Fed. R. Evid. 702 15

Miscellaneous:

H.R. Rep. No. 383, 104th Cong., 1st Sess. (1995) 30, 33, 36
Restatement (Second) of Agency (1958) 21
Webster's Third New International Dictionary of the English Language (1993) 15, 16, 22

In the Supreme Court of the United States

No. 08-1498

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

No. 09-89

HUMANITARIAN LAW PROJECT, ET AL.,
CROSS-PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENTS

I. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

A. The Court Of Appeals Confused The Vagueness And Overbreadth Doctrines

Petitioners make virtually no effort to defend the rationale on which the court of appeals rested its decision—namely, that the challenged terms are vague because they can "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a; see *id.* at 24a, 25a. That rationale conflates two distinct constitutional doctrines: vagueness and overbreadth. Gov't Br. 42-43; see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 n.9 (1982) (*Village of Hoffman Estates*). Vagueness doctrine asks whether, for purposes of the Fifth Amendment, the contested terms in the material-support statute have a clear meaning to an ordinary person. Overbreadth doctrine asks whether, for purposes of the First Amendment, those terms reach an impermissible amount of constitutionally protected expression. The court below wrongly collapsed those separate inquiries.

The single sentence that petitioners devote to defending the court of appeals' reasoning asserts that this Court has "link[ed] * * * the doctrines when vague statutes implicate speech." Reply Br. 19. But this Court has linked the doctrines when a plaintiff challenges a statute as both facially vague and overbroad—*i.e.*, when a plaintiff "argue[s] that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008); see *Village of Hoffman Estates*, 455 U.S. at 489, 494-495, 498 & n.6; *Cox* v. *Louisiana*, 379 U.S. 536, 551-552 (1965). That linkage cannot explain the confusion in the court of appeals' analysis, because the court held that "[t]he issue of a facial vagueness challenge" was not presented. Pet. App. 22a n.6. With that issue not in play, the court should have assessed whether the material-support statute is vague as applied to petitioners' proposed conduct, and then assessed whether the statute is overbroad on its face. In any event, the court did not find, nor could it have found, that the vagueness it saw in the statute rendered the statute substantially overbroad. As petitioners' passing defense of the rationale of the decision below implicitly suggests, that rationale conflicts with this Court's precedents. Reversal is warranted for that reason.

B. The Statute's Terms Are Sufficiently Clear To Provide Notice To Persons Of Ordinary Intelligence

Implicitly conceding the weakness of the court of appeals' core rationale, petitioners ask for affirmance on a ground barely noted and still less defended in the decision below: that the material-support statute's terms do not provide sufficient notice to ordinary persons of what conduct violates the law. See Reply Br. 4-19. But that basis for the decision is no better than the one on which the court of appeals principally relied. The terms of the material-support statute, when given their ordinary meaning, clearly cover petitioners' proposed activities: there is nothing vague and nothing uncertain about how the statute applies to the assistance that petitioners wish to give terrorist organizations. As a result, even though petitioners raise only an as-applied challenge to the statute, they say almost nothing about their own proposed conduct. They instead level against the statute a number of facial attacks, which are irrelevant to their claim and, in any event, mistaken on the merits. Before turning to the clarity of the statute's terms as applied to petitioners' conduct, we address three errors that infect all of their analysis.

First, petitioners continue to seek a heightened standard of review, citing (Reply Br. 5) this Court's decisions in *Village of Hoffman Estates* and *Smith* v. *Goguen*, 415 U.S. 566 (1974). But neither those cases nor any other case has suggested that a generally applicable, content-neutral statute regulating conduct is subject to a special, heightened vagueness standard whenever any of its applications potentially reaches expressive activity. *Goguen* involved a flag-desecration statute whose terms suggested a governmental interest in suppressing a particular message. *Id.* at 575-576; *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989). And in *Village of Hoffman Estates*, the Court did not apply a heightened First Amendment standard of review; rather, it held that the ordinance at issue received at most the scrutiny appropriate for criminal laws regulating conduct, notwithstanding that the entity subject to the law alleged that the law incidentally restricted its expression. 455 U.S. at 496, 499-500.

Even assuming, however, that some heightened standard might otherwise apply, "the Court has recognized that a scienter requirement may mitigate" any need for greater legislative precision. *Village of Hoffman Estates*, 455 U.S. at 499. Petitioners argue (Reply Br. 6) that the material-support statute's express scienter requirement does not qualify under this well-settled law, because the defendant does not have to know that his aid qualifies as "material support or resources," 18 U.S.C. 2339A(b)(1); he only has to know that his aid is directed toward a "foreign terrorist organization," 18 U.S.C. 2339B(a)(1). But petitioners cite no precedent suggesting that scienter must go to each and every element of the offense. Here, Congress mitigated doubt about the scope of the statute by requiring scienter for a particularly important element, ensuring that the statute would extend only to persons who provide aid to groups that they know to be terrorist. That requirement provides substantial "notice to the complainant that his conduct is proscribed," *Village of Hoffman Estates*, 455 U.S. at

499, and thus forecloses any need for a heightened standard of review.

Second, petitioners suggest (Reply Br. 18) that their vagueness challenge is facial rather than as-applied. That suggestion, however, conflicts with the history of this litigation. The court of appeals held that petitioners had presented only an as-applied, and not a facial, vagueness challenge. Pet. App. 22a n.6. Petitioners agreed with that holding at the certiorari stage. See Br. in Opp. 17; Cross-Pet. 3 n.2 ("[R]espondents seek to enjoin these [challenged] provisions only with respect to their proposed speech activities."). In their opening brief to this Court, petitioners stressed that they challenge the vagueness of the statute only as applied to their particular conduct. See Pet. Br. 4, 25. Petitioners now attempt (Reply Br. 18) to cast their *vagueness* challenge as facial by pointing to their assertion of an *overbreadth* challenge. But petitioners' overbreadth challenge is necessarily facial; there is no such thing as an as-applied overbreadth challenge. That says nothing about the nature of their vagueness challenge, which they have repeatedly presented as as-applied. And even assuming that petitioners had presented a facial vagueness claim, it would fail for the same reasons as their overbreadth claim: the material-support statute is clear in the vast majority of its intended applications. See p. 26, *infra*; see also *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000).

Third, petitioners attempt to dismiss (Reply Br. 6-7) their own use, to describe their own conduct, of the very words and phrases that they claim an ordinary person could not understand. They maintain that "[t]he fact that a term is used as a general descriptive matter in the English language" does not mean that it is "a permissible basis for criminalizing speech." *Id.* at 6. To the contrary, that is precisely what it means for vagueness purposes (putting aside any independent First Amendment argument). If the challenged terms were clear enough to petitioners "as a general descriptive matter in the English language," then a person of ordinary intelligence would understand the statute's use of those terms. See *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U.S. 472, 476-477 (1972) ("The term 'responsive' in ordinary English usage has a well-recognized meaning. It is not * * * 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'") (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). Petitioners' own pleadings betray them; in choosing, to describe their proposed conduct, the selfsame language Congress chose to describe the prohibited conduct, petitioners acknowledge that the statute is not vague.

1. Instructing the PKK and LTTE on how to engage in international political advocacy constitutes "training"

a. Petitioners' response is most interesting for what it does *not* say with respect to the term "training." Petitioners barely discuss their own proposed activities; and when they do, they cast those activities in the broadest possible terms, such as "teaching people to advocate for peace and human rights" and "human rights instruction." Reply Br. 8-9. That is because, if petitioners were to say anything more concrete about their proposed activities, they would trip over the word "training" at every turn. The record reveals that such stumbling is what occurred below: petitioners understood their conduct as "training," and said so. Petitioners' complaint thus repeatedly referred to their proposed activities as "training." See Gov't Br. 21. And at oral argument before the en banc court of appeals, their counsel twice referred to the "human rights advocacy training" that petitioners hope to provide. *Id.* at 26. Notably, petitioners are silent as to why an ordinary person would not share their own ready understanding of the term "training" as applied to their activities.

Nor should petitioners' newly generalized descriptions obscure the nature of their specific conduct. For example, petitioners alleged in their complaint that, in the past, "Judge Fertig and other HLP representatives have provided training to some members of the PKK and other Kurds on how to present their human rights claims before the U.N. and other public-policy making bodies, including the United States Congress." J.A. 58. And in the future, the complaint goes on to say, "[t]he HLP and Judge Fertig would like to * * * advis[e] Kurds and Kurdish groups on recent developments in international human rights law, the procedures for seeking review by the newly established International Criminal Court, peacemaking negotiation skills, and advocacy of the rights of Kurds before the Human Rights Subcommission of the United Nations and legislative bodies throughout the world, including the United States Congress." J.A. 59.

On any understanding of the difference between "general knowledge" and "specific skill[s]," 18 U.S.C. 2339A(b)(2), petitioners want to impart the latter. They want to instruct the PKK and LTTE on how to appear, lobby, or petition before bodies like Congress, the International Criminal Court, and the Human Rights Subcommission of the United Nations. That activity—methods of engaging national and international bodies as to human rights claims—is not well known to members of the general public, and instruction in it requires education and experience that relatively few members of the public possess. Petitioners do not attempt to argue otherwise. See Reply Br. 7-9. The clarity of the term "training" as defined in the statute and as applied to petitioners' proposed conduct is fatal to their claim of vagueness.

b. In any event, petitioners' facial attacks on this term of the material-support statute fare no better. The term "training" ordinarily refers to instruction in a specialized skill, see Gov't Br. 19-20, and many federal statutes use the term in that manner, *id.* at 20 & n.2. Yet petitioners do not point to a single decision holding that "training"—or even any similar term—is vague. Petitioners respond (Reply Br. 9) that most of those other statutes neither define a criminal offense nor impose a penalty. Cf. 8 U.S.C. 1182(a)(3)(B)(iv)(VI) (denying admission to aliens who provide material support, including "training," to terrorists). But absent some evidence to the contrary, a term that is intelligible in other legal settings does not suddenly become unintelligible when employed in the criminal context. Although Congress attached criminal consequences to the provision of "training" to foreign terrorists, that term retains its customary and usual meaning in the material-support statute.

Even if the term "training" were not sufficiently clear standing alone, that would not assist petitioners, because as noted above, Congress elaborated the meaning of that term by reference to "specific skill[s]." After the court of appeals held in an earlier stage of this litigation that the term "training" was vague (notably, because it may "encompass[] First Amendment protected activities"), *Humanitarian Law Project* v. *United States Dep't of Justice*, 352 F.3d 382, 404 (2003), Congress further defined that term in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(c), 118 Stat. 3762, to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Congress thereby removed any possible ambiguity in the statute, by further defining "training" to mean only instruction in a specific skill. *Cf. Blakely* v. *Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design."). This Court reviews Congress's enactments for reasonable precision, see *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), and Congress clarified the statute to ensure beyond peradventure that it met this standard.

Petitioners incorrectly contend that "[e]very judge to have ruled on the 'training' prohibition in this case * * * has concluded that it is fatally unclear about what speech is prohibited." Reply Br. 7. In fact, what the courts below principally concluded—albeit under the mistaken label of "vagueness" analysis—is that the material-support statute reaches some protected expression. See Pet. App. 22a, 63a. Indeed, the court of appeals specifically held that the statute was impermissibly vague "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" because "the term 'training' could still be read to encompass speech." *Id.* at 22a. In other words, the court held that the term "training" is vague.

even if its statutory definition is *not* vague according to the well-established constitutional test.

Moreover, Congress's distinction between a specific skill and general knowledge is not itself vague. That distinction is common to the law. Several federal statutes distinguish between the general and the specific, see Gov't Br. 23, and the Sentencing Guidelines distinguish between generalized and specialized skills, see *id.* at 22 n.3. Petitioners do not say whether, on their view, each of those provisions would be subject to a potential vagueness challenge. They argue that similar statutes and the Sentencing Guidelines "do[] not separate criminal from non-criminal conduct." Reply Br. 9 n.2. But the response seems not to the point, which is that in all contexts (criminal and noncriminal alike) legislators and judges routinely depend on and apply a "general-specific distinction." *Id.* at 7. Its prevalence in the law, and the apparent ease with which it is applied, belies any contention that the distinction is "inescapably subjective." *Ibid.* After all, the vagueness inquiry turns not on how often Congress has used that distinction in defining criminal offenses, but on whether the distinction between imparting specific skills and imparting general knowledge is readily intelligible to the average person. The frequency of the distinction's appearance in the United States Code, as well as in ordinary language, answers that question.[1]

---

[1] This Court has recognized that a statute is not vague merely because it might be characterized as involving a distinction of degree. Pet. Br. 27. In *Scales* v. *United States*, 367 U.S. 203 (1961), this Court interpreted the Smith Act, 18 U.S.C. 2385, to require active membership in certain organizations. It then rejected a vagueness challenge to the statute, holding that "[t]he distinction between 'active' and 'nominal' membership is well understood in common parlance, and the point at

Petitioners also incorrectly argue that this Court's decision in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), "underscores the terms' ambiguity." Reply Br. 8. *Pierce* concerned a provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(2)(A)(ii), authorizing increased attorney fees for "a special factor, such as the limited availability of qualified attorneys for the proceedings involved." In light of that language, the Court held that increased fees were available only for "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572. Notably, the Court foresaw no difficulty in distinguishing between attorneys with specialized skills (like those who practice in the fields of intellectual property or foreign law, see *ibid.*) and attorneys with more general legal knowledge.

Petitioners contend that "[j]udicial determination of attorney compensation is a far cry from criminalizing speech." Reply Br. 8. Like the courts below, petitioners conflate their substantive challenges under the First Amendment with their vagueness challenge under the Fifth Amendment. *Pierce* demonstrates that the distinction between specialized skills and general knowledge is capable of clear application to a particular context; it is a separate question whether the statutory term defined by that distinction, as applied to petition-

---

which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case." *Scales*, 367 U.S. at 223 (internal citations omitted).

ers' conduct, runs afoul of the First Amendment.[2] The former goes to whether a statute is clear, while the latter goes to whether a clear statute is otherwise permissible. For purposes of vagueness doctrine, the critical point is that neither Congress, nor the Sentencing Commission, nor this Court, nor other courts have struggled to understand or apply the distinction between specific skills and general knowledge in any context. That distinction is no more difficult to understand or apply as it appears in the material-support statute.

For the proposition that the distinction between general knowledge and specific skills is "inescapably subjective," petitioners continue to rely (Reply Br. 7-8) solely on *Gentile* v. *State Bar*, 501 U.S. 1030 (1991). As the government previously explained, that decision is inapposite. See Gov't Br. 23-24. The state ethics rule at issue in *Gentile* prevented attorneys from "elaborat[ing]" on "the general nature of the claim or defense," 501 U.S. at 1048, and thereby demanded a subjective judgment about how much attorney speech is too much. Nothing of the kind is involved in the material-support statute. The term "training" requires an objective determination that the defendant's instruction was designed to impart a specific skill, not generally possessed by the public. Whether members of the public generally possess a skill "is a true-or-false determination, not a subjective judgment." *Williams*, 128 S. Ct. 1846. To be sure, "it may be difficult in some cases to determine" whether instruction is designed to impart such a skill, but "courts and juries every day pass upon" exactly that type of factual question. *Ibid.* (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950)). And, unlike the rule in *Gentile*, the material-support statute contains a scienter requirement, which diminishes any residual danger that a person might inadvertently train foreign terrorists in specific skills. See 501 U.S. at 1049-1050.[3]

---

[2] Petitioners argue that under "the EAJA standard" their "proposed human rights instruction" involves general knowledge rather than specialized skill. Reply Br. 8-9. That is false: very few attorneys are capable of teaching others how to appear, lobby, or petition before governmental bodies on matters relating to international and human rights law. Indeed, the Court in *Pierce* specifically cited foreign law as the kind of subject matter requiring specialized knowledge. 487 U.S. at 572. In any event, applying the distinction between specialized skills and general knowledge depends in part on context. Unlike the EAJA, the material-support statute asks whether an ordinary citizen (not an attorney) is imparting to foreign terrorists (not legal clients) skills that are specialized vis-à-vis the general public (not the legal profession).

2. *Consulting with the PKK and LTTE on international law, medical care, and economic development constitutes "expert advice or assistance"*

a. Although their vagueness challenge is as-applied, petitioners likewise do not address how application of the term "expert advice or assistance" to their proposed conduct involves any doubt or uncertainty. In the past, "Judge Fertig, acting on behalf of the HLP, * * * has assisted members of the PKK and its political arm, the ERNK, in attempting to resolve peacefully the conflict between the Turkish government and the Kurds." J.A. 58. In the future, Judge Fertig and the HLP want to continue to "assist PKK members at peace conferences and other meetings designed to support a peaceful resolution of the Turkish conflict." J.A. 59; see Pet. Br. 10. Other petitioners want to aid the LTTE by providing "expert medical advice and assistance," J.A. 60; "expert advice on how to improve the delivery of health care, with a special focus on the area of otolaryngology," J.A. 61; and "expert advice and assistance" "in the fields of politics, law, and economic development," *ibid.*, as well as "information technology," J.A. 62.

---

[3] The ethics rule in *Gentile* also was a content-based regulation of speech—*i.e.*, "a ban on political speech critical of the government and its officials." 501 U.S. at 1034. Such a regulation "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). By contrast, the material-support statute is a generally applicable, content-neutral regulation of conduct. See pp. 27-34, *infra*.

It is unsurprising that all of the petitioners describe their proposed activities as "expert" in nature. International peace negotiators, medical doctors, development economists, and software programmers are commonly thought of as experts. Cf. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 221-222 (1977) (noting that the negotiation of a collective-bargaining agreement may require the services of "expert negotiators"). Even without further explanation, the term "expert" is as ordinary and as readily understood as the vast majority of words found in federal (including criminal) statutes; and that term obviously applies to petitioners' conduct. But Congress removed any doubt about the meaning of that term by defining "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). Petitioners do not attempt to argue with any particularity that the types of assistance they enumerate in their complaint do not "derive[] from scientific, technical or other specialized knowledge." Because that definition clearly covers petitioners' proposed activities, their as-applied vagueness challenge must fail.

b. In any event, petitioners cannot demonstrate that the phrase "scientific, technical or other specialized knowledge" is unconstitutionally vague as applied to conduct generally. Petitioners do not directly respond to the government's argument that the terms "scientific" and "technical" have objective and readily understood meanings. Gov't Br. 31 ("[T]he use of terms like 'scientific' and 'technical' rests on factual determinations—*i.e.*, whether knowledge is specific, practical, and related to a particular branch of science or a profession.") (quoting *Webster's Third New International Dictionary of the English Language* 2348 (1993) (*Webster's*)). Nor do petitioners respond to the government's argument (Br. 30) that, under the principle of *ejusdem generis*, the term "specialized knowledge" takes it meaning from the preceding terms "scientific" and "technical." Under that commonly employed concept (even if uncommonly used label), an ordinary person would understand the entire phrase to mean knowledge relating to subject matter and based on experiences not commonly possessed or shared by the general public.

Because Congress drew the phrase "scientific, technical, or other specialized knowledge" from Federal Rule of Evidence 702, petitioners argue (Reply Br. 10) that the phrase's meaning is apparent only to judges, not ordinary citizens. But in interpreting Rule 702, this Court has looked to the ordinary meaning of the rule's words, see Gov't Br. 29-30, and petitioners do not contend otherwise. Moreover, even assuming (what is self-evidently not true) that the phrase "scientific, technical or other specialized knowledge" had a determinate meaning only in the legal context, that would not assist petitioners. In assessing the clarity of federal statutes, courts have long looked to whether Congress "employed words or phrases having a technical or other special meaning, * * * or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Connally*, 269 U.S. at 391; see *Williams*, 128 S. Ct. at 1846 ("[W]e have struck down statutes that tied criminal culpability to * * * wholly subjective judgments *without* statutory definitions, narrowing context, or *settled legal meanings*.") (emphasis added).

Petitioners no longer argue that all knowledge is derived from scientific, technical, or other specialized knowledge. See Pet. Br. 29-30. Rather, they now assert that the phrase "derived from" is itself "too indeterminate" to provide sufficient notice to an average person. Reply Br. 10. But there is no difficulty in applying that phrase to this case. Petitioners want to impart skills that they developed as a result of their substantial education and experience in law, medicine, and technology. See *Webster's* 608 (defining "derived" as "formed or developed out of something else"). The connection between petitioners' specialized knowledge and the expert assistance they seek to render is obvious and unattenuated. And petitioners offer no ground or evidence to think that the phrase "derived from" will be less clear as to some other set of persons involved in different activities. Suggestive of the opposite is the use of the identical phrase several hundred times in the United States Code. Petitioners say nothing about which of those other provisions are, on their view, also unconstitutional.

Petitioners contend (Reply Br. 10-11) that the distinction between types of general knowledge (like geography) and types of specialized knowledge (like geoscience or geopolitics) is "fundamentally indeterminate." *Id.* at 11. But a reasonable person contemplating assistance to foreign terrorists understands the difference between subjects that require substantial education or experience and subjects that do not. Indeed, petitioners' own example proves the point as well as any other. It does not require specialized knowledge to inform the LTTE's members of what presumably they and many others already know: Sri Lanka is an island nation located off the southern coast of India (geography). Yet it would require specialized knowledge to inform them of what they and others will not commonly know, such as, for instance, whether and where Sri Lanka contains large deposits of mineral ores (geoscience) or how European colonization has affected the country's current government (geopolitics). A person instructing members of the LTTE on how to develop natural resources or capitalize on nationalist trends is offering exactly the type of "expert advice or assistance" that Congress targeted in the material-support statute.[4]

3. Providing persons to work under the direction or control of the PKK and LTTE constitutes "personnel"

a. In their discussion of the term "personnel," petitioners again say nothing at all about their proposed activities. Among other things, petitioners seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * * and * * * assist PKK members at peace conferences and other meetings." J.A. 58-59. As amended by Congress in IRTPA, the term "personnel" requires that a defendant knowingly provide one or more persons "to work under" a foreign terrorist organization's "direction or control" or "to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. 2339B(h). By contrast, the statute exempts any individual "who act[s] entirely independently of the foreign terrorist organization to advance its goals or objectives." *Ibid.* Petitioners do not attempt to argue that their intended conduct, coordinated as it is with the PKK and LTTE, does not fall within the statutory definition of "personnel."

---

[4] Petitioners claim that the types of aid prohibited by the material-support statute—such as "false documentation or identification, communications equipment, * * * weapons, lethal substances, [and] explosives," 18 U.S.C. 2339A(b)(1)—suggest that the statute "forbids only advice that furthers a group's violent ends." Reply Br. 11. But the statute also prohibits the provision of many other types of aid including "currency or monetary instruments or financial securities, financial services, lodging," "facilities," and "transportation," 18 U.S.C. 2339A(b)(1)—which need not be used to further a group's violent ends.

b. Petitioners' "principal vagueness objection" is that between action taken under a foreign terrorist organization's direction or control and action taken independently of that organization, there is a "vast gray area" that creates uncertainty "as to what is permissible." Reply Br. 15. That claim—*i.e.*, that the scope of the statute is so unclear that persons who want to assist known foreign terrorists cannot know what forms of aid generally are prohibited—is the essence of a facial, not as-applied, vagueness challenge. See *Williams*, 128 S. Ct. at 1845; *Village of Hoffman Estates*, 455 U.S. at 494-495, 497-498.

In any event, the question whether a defendant has acted "under [a] terrorist organization's direction or control" is simply a factual issue to be resolved by the jury in a particular case. 18 U.S.C. 2339B(h). That question may be close in some circumstances, but the possibility of hard cases does not render the term "personnel" vague. As this Court reasoned in *Williams*, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." 128 S. Ct. at 1846. Nothing about the facts to be established under the "personnel" provision is indeterminate.

Contrary to petitioner's claim (Reply Br. 15-17), the government has not argued that the material-support statute somehow incorporates antitrust doctrine. Section 2339B(h) requires a particular type of concerted action: "work under [a] terrorist organization's direction or control." The government has never contended that this statutory requirement mirrors the Sherman Act, and petitioners' extended discussion of this comparison is therefore beside the point. What the government has argued, and what goes unrebutted by petitioners, is that a number of federal statutes rely in some manner on the distinction between action taken independently and action taken in concert with another. Accordingly, "[j]ust as, for instance, an ordinary person understands the difference between 'concerted effort by more than one entity to fix prices or otherwise restrain trade' and 'independent activity by a single entity,' *Fisher* v. *City of Berkeley*, 475 U.S. 260, 266 (1986), so too he will understand the difference between acting under a foreign terrorist organization's 'direction or control' and acting on his own." Gov't Br. 35.

Indeed, quite apart from antitrust law, the definition of "personnel" is similar to terms used in other federal statutes that impose criminal liability on persons who either act under another's direction or control, see, *e.g.*, 18 U.S.C. 175b(d)(2)(G); 18 U.S.C. 951(d), or manage, supervise, or organize an operation or individual, see, *e.g.*, 18 U.S.C. 225(a)(1); 18 U.S.C. 1169(b)(1); 18 U.S.C. 1960(a). Petitioners argue that "[n]one of the cited statutes threatens to criminalize otherwise protected First

Amendment activity based solely on varying levels of coordination with a designated group." Reply Br. 17. But again, petitioners conflate their First and Fifth Amendment challenges. The question for vagueness purposes is not whether the First Amendment permits the criminalization of conduct (or, as petitioners would have it, expressive activity) that occurs in coordination with known foreign terrorists. Rather, the relevant question is whether the concept of coordination is too indeterminate to provide the basis for criminal liability. As numerous federal statutes demonstrate, the answer is no.

Two of these federal criminal statutes impose liability on persons who act under "the direction or control" of another. See 18 U.S.C. 175b(d)(2)(G) (prohibiting the possession, shipment, or transportation of certain biological agents by "an individual who * * * operates subject to the direction or control of" a foreign government designated by the Secretary of State as supporting terrorism); 18 U.S.C. 951(d) (requiring notification to the Attorney General by certain "individual[s] who agree[] to operate within the United States subject to the direction or control of a foreign government or official"). Petitioners attempt in vain to distinguish those statutes.

With respect to Section 175, petitioners contend that "[t]he underlying prohibition on possessing biological agents has no nexus to protected speech, and thus need not satisfy heightened vagueness standards." Reply Br. 17 n.7. But Section 2339B(a)(1) also lacks any nexus to speech, prohibiting as it does the provision of material support and resources, including personnel, to known foreign terrorists. In any event, both Section 175 and the personnel provision here require, in order to establish the prohibited underlying conduct, a factual determination about whether an individual operates subject to "the direction or control" of a foreign entity. Petitioners never explain why raising the standard of review for the personnel provision would suddenly render that factual determination impossible.

With respect to Section 951, petitioners assert that it "invokes a traditional agency relationship." Reply Br. 18 n.7. But in specifically defining the phrase "agent of a foreign government," Section 951 chooses not merely to incorporate or rely on traditional agency principles. See Restatement (Second) of Agency § 1 (1958). Instead, it defines an "agent" as an "individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. 951(d). Once again, petitioners offer no explanation for why the same statutory phrase—"direction or control"—is clear in the context of Section 951(d) but indeterminate in the context of Section 2339B(h).

Finally, petitioners do not dispute that both before and after IRTPA's enactment, courts have consistently upheld the term "personnel" against vagueness challenges. See Gov't Br. 35-36. Petitioners claim that those cases did not involve "the type of loosely coordinated speech" in which they seek to engage. Reply Br. 18 n.7. But it is hard to see from the face of petitioners' complaint where this "looseness" resides; the activities mentioned there disclose direct and substantial connections to terrorist organizations. See J.A. 58-59. And as discussed above, petitioners have provided no further detail about their intended conduct before this Court. If petitioners' conduct will not occur under the "direction or control" of the PKK and LTTE, they have no reason to seek an injunction against enforcement of the term "personnel"; and if their conduct will occur under the "direction or control" of the PKK and LTTE, they have no basis for such an injunction.

4. *Helping the PKK and LTTE appear before national and international representative bodies constitutes "services"*

a. Petitioners do not attempt to explain why the term "service" is unclear as applied to their proposed conduct. No doubt that is because, although their hypotheticals suggest otherwise (Reply Br. 14), petitioners seek to render direct benefit to the PKK and LTTE by assisting in the actions that those groups undertake. Petitioners seek to "assist[] the PKK in appearing before national and international representative bodies such as the United Nations Human Rights Subcommission, the Council of Europe, the United States Congress, and international human rights conferences." J.A. 98. In particular, they seek "to provide training and expert advice and assistance * * * on how to bring claims and appeals of Kurds before the UN and other policy making bodies." J.A. 99. Petitioners' proposed conduct therefore falls squarely within the term "service" on any interpretation.

b. Petitioners contend that, as evidence of the term's ambiguity, "the government offers three dramatically different definitions" of "service." Reply Br. 12. That is not the case. See Gov't Br. 38-41. The government's principal position is that the term "service" refers to "an act done for the benefit or at the command of another." *Webster's* 2075; see Gov't Br. 38. Under this definition, the terrorist organization's command or behest is not a necessary element; petitioners themselves suggest that Congress intended to prohibit services "such as surveying and mapping a target site" that are provided to foreign terrorist organizations, even if not at their behest or command. Reply Br. 13. In light of the statute's purposes, Congress surely employed the term "service," consistent with its ordinary meaning, to refer to an act done for the benefit of a foreign terrorist organization. That definition fits well with the statute's additional requirement that the "service" be provided "*to* a foreign terrorist organization." 18 U.S.C. 2339B(a)(1) (emphasis added). Because of that requirement, it is not sufficient for a defendant, acting independently of a foreign terrorist organization, to perform an act that may in fact benefit that organization. Rather, the defendant must channel the intended benefit toward that organization.[5]

Petitioners incorrectly assert that the phrase "service to" is not limited to aid directed toward a foreign terrorist group, because "[i]ndependently acting to benefit someone is not uncommonly labeled rendering a service to him." Reply Br. 14. In fact, it would be unusual to say that someone who, on his own, performs an act that indirectly benefits the PKK and LTTE has rendered a type of "material support or resources"—*i.e.*, a "service"—"to" those groups. And petitioners' reading becomes all the more implausible when the word "service" is viewed in context. Section 2339A(b)(1) forbids providing a number of types of support to foreign terrorist organizations, from "currency" and "financial services" to "weapons" and "explosives." As the types of aid enumerated in the statute indicate, Congress was concerned with "service[s]" that are directed toward a foreign terrorist organization. See Gov't. Br. 39-40. Moreover, reading "service" to include independent advocacy, as petitioners suggest, would make meaningless Congress's decision to exclude such activity from the subsidiary term "personnel." "[T]he various provisions of the Act should be read *in pari materia*," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985), with "service" interpreted not to encompass types of conduct—like independent advocacy—that its subsidiary terms specifically exclude. See Gov't Br. 40.[6]

---

[5] Contrary to petitioners' argument (Reply Br. 14 n.4), the question is not whether the defendant renders aid to a terrorist organization directly or through an intermediary, but whether the defendant targets the organization as the ultimate recipient of its intended aid. See Gov't Br. 22, 39; see also Gov't C.A. Reply Br. 8 n.1 ("[T]he statute would prohibit, for example, giving money to a terrorist group through a third-party conduit.").

Indeed, the government has taken the position throughout this litigation that independent advocacy is not covered by the term "service." See, *e.g.*, Gov't C.A. Br. 46. That consistent position is entitled to respect in evaluating whether the term "service" is unconstitutionally vague. See *Grayned*, 408 U.S. at 110 (vagueness challenge to a statute requires consideration "to some degree" of "the interpretation of the statute given by those charged with enforcing it"); cf. *Village of Hoffman Estates*, 455 U.S. at 494 n.5 ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proferred.") (citing *Grayned*, 408 U.S. at 110).

---

[6] Contrary to petitioners' assertion (Reply Br. 13), this argument is not new. In their opening brief before the court of appeals, petitioners argued that the term "service" "is so broad that it swallows any of the limitations" contained in the other challenged terms. Pet. C.A. Br. 49-50. The government responded that "'service'—like the terms 'training' and 'expert advice or assistance'—is limited by surrounding statutory terms and context to mean support knowingly given directly to terrorist groups, and does not include independent advocacy that might indirectly benefit such organizations." Gov't C.A. Br. 46. Thus, petitioners have long been on notice that the government interprets the statutory phrase "service to" as excluding independent advocacy.

If, however, this Court finds that the government's preferred reading of "service" (as including "acts done for the benefit of another") could sweep in independent advocacy, even when combined with the word "to," then the Court should limit the term "service" to acts done at the command or behest of a foreign terrorist organization to further its goals and objectives. See Gov't Br. 40-41. Interpreted in that way, the statute could not possibly reach independent advocacy, and thus it would not, even on petitioners' approach, present a vagueness problem. "[W]hen 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.'" *Harris* v. *United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. the Att'y Gen. of the United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). To the extent that the government's principal reading of "service to" raises concern, this canon of constitutional doubt permits interpretation of the statute to require that a "service" be done at a foreign terrorist organization's command or behest.

Under either approach, whether the defendant has the requisite connection with a known terrorist organization is a straightforward factual question. The government may find it harder or easier to prove that connection in a given case, but nothing about the question itself is subjective or indeterminate. See *Williams*, 128 S. Ct. at 1846. Although petitioners strain to read the term "service" (Reply Br. 14), and indeed all of the challenged terms (*id.* at 18-19), in a manner that would render the statute unconstitutional, the duty that this Court owes to a coordinate Branch compels a different course. See, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009). Reasonably interpreted, the contested terms in the material-support statute all have a clear meaning to an ordinary person, and accordingly the statute is not unconstitutionally vague.

II. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID TO KNOWN TERRORIST ORGANIZATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners largely abandon (Reply Br. 18-19) their claim that the material-support statute is overbroad. They assert in passing that the four challenged terms "are so profoundly indeterminate that they are facially overbroad," *id.* at 18, but they make no effort to demonstrate that the statute prohibits a "substantial" amount of protected expression, judged both in absolute terms and in relation to the statute's legitimate applications, *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). Although petitioners say (Reply Br. 18-19) that the statute interferes with the work of some of their amici, those amici do not themselves contend that the statute is overbroad. See Carter Center Amicus Br. 6, 28. In the end, petitioners offer no serious challenge (nor could they) to the court of appeals' conclusion that Section 2339B is not overbroad.

Petitioners continue to argue (Reply Br. 20-39) that Section 2339B, as applied to their proposed conduct, violates their speech and association rights. Not a single court (and indeed not a single judge on the en banc court of appeals in this case) has accepted either of those arguments. The material-support statute is a content-neutral regulation of conduct that at most incidentally restricts petitioners' speech and association. It is therefore subject to no more than intermediate scrutiny on both claims under *United States* v. *O'Brien*, 391 U.S. 367 (1968). And, as the court of appeals held, it survives such scrutiny because it is narrowly tailored to advance important governmental interests unrelated to the suppression of expression or association.

A. The Statute Is A Regulation Of Conduct That Only Incidentally And Permissibly Affects Expression

1. As a facially neutral regulation of conduct, Section 2339B may impose an incidental burden on speech

a. Petitioners' challenge is defeated by two key points. See Gov't Br. 44-47. First, Section 2339B is a regulation of a type of conduct—providing aid to foreign terrorist organizations. *Id.* at 45. That prohibition on conduct applies without regard to whether the donor of the aid intends to convey a particular message or engage in expression at all. Accordingly, to the extent that Section 2339B restricts expressive activity, that restriction is incidental to a generally applicable and content-neutral ban on conduct. Second, Section 2339B's ban on providing aid to foreign terrorist groups is justified by a governmental interest that is unrelated to the suppression of expression. The statute is directly geared to preventing the flow of material aid to groups whose violent activities threaten American lives and interests. *Id.* at 45-47.

b. Under this Court's precedents, generally applicable regulations of conduct that impose an incidental burden on expression are subject to intermediate scrutiny under *O'Brien*. See, *e.g.*, *United States* v. *Albertini*, 472 U.S. 675, 687 (1985) ("Application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment" if it survives intermediate scrutiny.); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 604 (2001) (Stevens, J., concurring in part) ("This Court has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression."); *id.* at 567.

Petitioners appear to argue (Reply Br. 20-26) that the *O'Brien* test applies only when a facially neutral regulation of conduct imposes an incidental burden on acts, divorced from all words, that express a message. That argument makes clear that it is petitioners, not the government, who hope to "radically revise[ ]" "First Amendment doctrine." *Id.* at 26. This Court has never limited *O'Brien*'s test for incidental restraints in such a manner. To the contrary, this Court has held that intermediate scrutiny applies to content-neutral regulations of conduct that impose incidental burdens on communication, regardless whether that communication is written, oral, or (as in *O'Brien* itself) symbolic. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997) (*Turner II*); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994) (*Turner I*); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985); *City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804-805 (1984); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). So far as the government is aware, no member of this Court, nor any lower court, has suggested that strict scrutiny should replace the *O'Brien* test when a generally applicable, content-neutral regulation of conduct incidentally restrains expression involving words.

Nor do petitioners explain why the Court should limit the *O'Brien* test to cases in which the incidental restriction burdens a single form of expression—*i.e.*, nonverbal expression. The conduct at issue in *O'Brien* was indisputably communicative in nature and purpose, and this Court did not suggest that it had some lesser value because it relied on symbols. See *Reilly*, 533 U.S. at 567 (noting *O'Brien*'s application to incidental restrictions of "communicative action"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (same). What matters under *O'Brien* and its progeny is not the form of a person's communication, but whether the government has regulated that communication only incidentally, as part of a general regulation that applies irrespective of the person's message.[7]

Section 2339B is just such a generally applicable regulation. What the statute prohibits is the act of providing aid to known foreign terrorist organizations in a wide variety of forms, tangible and intangible, economic and noneconomic. The statute applies regardless of a person's beliefs or motives in rendering material support to a terrorist organization. The statute applies regardless whether the support is accompanied by any expression (verbal or nonverbal) and, if it is, regardless of the content of that expression. See Pet. App. 28a. No doubt the statute sometimes will sweep in expression, including words. When, for example, a person trains a terrorist organization in building bombs or flying airplanes or (as here) petitioning international bodies, words are likely to be involved. But the statute does not specially regulate expression, let alone expression of any particular kind; nor does its application depend on any particular communicative effect. Cf. *Johnson*, 491 U.S. at 411-412. Section 2339B prohibits the provision of material support to known foreign terrorists generally, and therefore is subject to intermediate scrutiny under *O'Brien*.

---

[7] In an analogous context, this Court has applied the constitutional standard for time, place, and manner regulations—which "is little, if any, different" from the *O'Brien* standard for content-neutral regulations of conduct, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)—to instances of both expressive conduct, *ibid.*, and speech, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Whether applied to expressive conduct or speech, this Court has upheld a time, place, or manner regulation if it is "justified without reference to the content of the regulated speech." *Ibid.* (quoting *Clark*, 468 U.S. at 293).

c. For similar reasons, petitioners cannot claim that in enacting the material-support statute, Congress's interest was "related to the suppression of free expression." *Johnson*, 491 U.S. at 403. Congress's manifest interest was to end the flow of support and resources to foreign organizations engaged in violent and unlawful activities. Congress acted on the view that all support to such organizations, even if ostensibly directed at their legal activities, abetted their terrorist aims. Cf. *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), cert. denied, 130 S. Ct. 458 (2009). "[T]he fungibility of financial resources and other types of material support" would permit individuals "to supply funds, goods, or services to an organization," which would "help[] defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995) (*1995 House Re-*

port). Nothing about that governmental interest relates in any way to the suppression of free expression.

Petitioners appear to argue (Reply Br. 22-23) that because they wish to engage in "pure speech," the government's interest in applying the material-support statute to them must relate to suppressing expression. That proposition is wrong because its premise is wrong. More is at issue here than "only words," with "no nonspeech element or noncommunicative conduct." *Id.* at 22 (internal quotation marks omitted). To the contrary, what petitioners wish to do in this case has an obvious nonspeech element: they hope to provide material support to terrorists. And application of the statute to petitioners follows exclusively from their proposed provision of such support, in the form of training, expert assistance, and personnel.

This Court has recognized often that words can have nonspeech elements or be ancillary to conduct (just as acts can have speech elements or be ancillary to expression). For example, the Court in *R.A.V.* noted that spoken words may have "unprotected features" deriving from the "'nonspeech' element of communication." 505 U.S. at 386. That is why the government has the "power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise)," although that "does not entail the power to proscribe the same speech on the basis of a content element." *Ibid.* Similarly, the Court has acknowledged that language can be but a vehicle for or adjunct to proscribable conduct. In *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), this Court held that because "[t]he compelled speech" involved in that case was "plainly incidental to the Solomon Amendment's regulation of conduct," it did not violate the First Amendment: "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[8]

That is all that is at issue here. The application of Section 2339B to petitioners reflects the government's interest not in suppressing the expression of petitioners' ideas, but in preventing material support to foreign terrorist organizations. Petitioners propose to provide tangible assistance to terrorists through the medium of language, but that does not exempt them from the force of the statute. That is because the government is targeting the nonspeech (and *a fortiori* the noncontent) element of petitioners' proposed dealings with the PKK and LTTE.[9] Nor does it matter, as petitioners seem to think, that they wish through their training and other activities to support purportedly legitimate operations of terrorist organizations. Congress determined that by imparting to the PKK and LTTE valuable skills, petitioners free resources, either directly or indirectly, for terrorist organizations to devote to unlawful activities. Petitioners' actions thus strengthen those groups and, in turn, endanger American lives and interests. *1995 House Report* 81. Application of Section 2339B to petitioners arises only from these legitimate governmental interests; it prevents petitioners, no matter what ideas they have or express, from providing direct support to and thereby strengthening terrorist organizations.

---

[8] In *FAIR*, this Court noted that "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." 547 U.S. at 62. Similarly, the Court has long recognized that statutes prohibiting such conduct as blackmail, bribery, fraud, and treason—even though all those acts are effectuated through the use of language -raise no serious First Amendment concern.

[9] It is for this reason that cases like *Cohen* v. *California*, 403 U.S. 15 (1971), are utterly inapposite. See Reply Br. 26 & n.12. In those cases, unlike in this one, the government's application of a statute arose from and targeted the content of a speaker's message or the likely communicative impact of that message on its intended audience.

2. Section 2339B is not a content-based restriction on speech

a. Petitioners argue (Reply Br. 29-30) that the material-support statute's prohibitions on "training" and "expert advice or assistance" (but apparently not "personnel" and "service") are content-based. Petitioners agree (*id.* at 28), as they must, that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 448 (2002). That rule resolves the question. The categories of "training" or "expert advice or assistance" do not necessarily refer to speech at all; nor do the provisions distinguishing between general knowledge and specific skills, on which petitioners seem to place greatest weight. Such prohibitions on conduct do not become content-based regulations of speech because they incidentally restrict some but not all expressive activity.[10] And even as and when applied to expressive activity, the statutory terms do not distinguish based on viewpoint or subject matter or speaker or any other consideration that this Court has viewed as suspect in its First Amendment case law. The training and expert assistance prongs of Section 2339B prohibit aid to terrorist organizations—not speech and certainly not speech with any particular message.

---

[10] Petitioners appear to agree (Reply Br. 29-30) that a law is not content-based simply because one must "look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill* v. *Colorado*, 530 U.S. 703, 721 (2000). Although *Hill* concerned time, place, and manner regulations, that fact

b. Petitioners further argue (Reply Br. 28) that the statute is content-based because it does not prohibit the provision of medicine and religious materials. See 18 U.S.C. 2339A(b)(1). But that limitation again has nothing to do with the content of any speaker's message. Congress was entitled to find that certain forms of assistance are not fungible, and so will not inevitably aid the activities of terrorist organizations that endanger American lives and interests. Or Congress was entitled to determine that the humanitarian value of some forms of aid outweighs the interests supporting their prohibition. If Congress may ban the flow of material support or resources generally, then it may narrow that ban by creating exceptions, so long as the governmental interest in those exceptions—like the governmental interest in the ban itself—is unrelated to the suppression of expression. The justification for preventing resources from flowing to terrorists becomes no less significant because Congress has determined that some resources present lesser dangers. See *Albertini*, 472 U.S. at 687 ("That justification [for excluding the defendant] did not

---

is irrelevant. A host of generally applicable laws regulating conduct work in the same way, such as statutes regulating discrimination or misbranding of products. Determining whether a defendant has violated the law depends on knowing what he has said, but that does not render such laws content-based.

become less weighty when other persons were allowed to enter.").

3. Section 2339B is narrowly tailored to advance the important governmental interest in preventing aid to terrorists

a. Petitioners contend (Reply Br. 31-32) that the government must justify the material-support statute as applied to their specific conduct. But that requirement does not apply to statutes subject only to intermediate review. As this Court explained in *Albertini*, "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." 472 U.S. at 688. According to the Court, "[r]egulations that burden speech incidentally * * * must be evaluated in terms of their general effect." *Id.* at 688-689 (internal citation omitted); see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("[T]he validity of this regulation need not be judged solely by reference to the demonstration at hand."). Here, the government must prove that it has a substantial interest in the material-support statute taken as a whole, not taken in each particular application. And petitioners concede that, as a general matter, the government has "legitimate interests" in Section 2339B. Reply Br. 32.

b. In any event, petitioners' argument (Reply Br. 33-35) that the government lacks a sufficiently important interest to regulate their activity does not defeat Congress's considered judgment. Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247. Petitioners claim that Congress had in mind only "'contributions,' not speech," Reply Br. 33, but in fact Congress deliberately extended the prohibition beyond monetary donations. The accompanying House Report makes clear that, without Section 2339B, "the fungibility of financial resources *and other types of material support*" would permit individuals "to supply funds, *goods, or services* to an organization." *1995 House Report* 81 (emphasis added). Congress thus was concerned about the delivery of a broad array of material support, including the services that petitioners wish to provide. That Congress did not mention speech is only further evidence that Section 2339B is content-neutral: Congress cared generally about individuals rendering service to foreign terrorist organizations, regardless whether that service involved any expression.

c. Petitioners similarly assert that "[h]uman rights advocacy training and peacemaking are not fungible like money." Reply Br. 34. That assertion in fact underlies petitioners' entire case, but it is addressed to the wrong branch of government. Petitioners dispute (*id.* at 42-44) the idea that assisting terrorist organizations in the way they propose will endanger American lives and interests. But Congress has made a different judgment about the need to prevent aid to foreign terrorist organizations generally, and that judgment is entitled to respect. See, *e.g.*, *Turner II*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'") (quoting *Turner I*, 512 U.S. at 665); *United States* v. *Eichman*, 496 U.S. 310, 314 (1990) (noting "the deferential standard" of review that applies to "regulations of conduct containing both speech and nonspeech elements where 'the governmental interest is unrelated to the suppression of free expression'") (quoting *O'Brien*, 391 U.S. at 377).

That is especially so in this context because Section 2339B implicates sensitive national security and foreign affairs interests, to which a heightened degree of deference to Congress and the Executive Branch is warranted. See *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) ("Because the judgment of how best to achieve that end [of combating terrorism] is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal."), cert. denied, 532 U.S. 904 (2001); see also *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Regan* v. *Wald*, 468 U.S. 222, 242 (1984).

Even taken on its own terms, petitioners' view on this score is at odds with itself. Petitioners broadly claim (Reply Br. 42-44) that training terrorist organizations in peacemaking and human rights advocacy will not undermine national security. But they conceded before the lower courts that Congress could constitutionally prohibit any and all forms of support to al Qaeda—presumably because such aid does pose a security danger. See Pet. C.A. Br. 32 n.13. Petitioners' position thus amounts to a claim that Congress may not extend the material support statute to additional terrorist organizations, including the PKK and LTTE. The basis for that claim, as the government noted in its opening brief (at 57), has nothing to do with the statute's supposed vagueness, content-discrimination, or associational effects. Rather, it is grounded in petitioners' policy judgment about aid to al Qaeda as compared with aid to other terrorist organizations. Petitioners' silence in response speaks volumes about the real basis of this lawsuit.

B. The Statute Does Not Infringe Petitioners' Right Of Association

1. Petitioners contend (Reply Br. 36-39) that the material-support statute violates their right to associate with foreign terrorist organizations. But just as Section 2339B regulates conduct—the act of giving material support—regardless of its expressive content, so too it regulates such conduct regardless of simple membership in or association with foreign terrorist groups. It is therefore again subject to intermediate scrutiny under *O'Brien*. And it survives that scrutiny for essentially the same reason: it is narrowly tailored to advance important governmental interests unrelated to the suppression of association. See Gov't Br. 59-61. Petitioners' only answer to these points is to misstate the extent of what Section 2339B prohibits.

Petitioners assert that by "effectively outlawing all 'concerted activity,'" Section 2339 "penalize[s] virtually *anything* one might do in association with a designated group." Reply Br. 36. That assertion ignores the point, made by both the court of appeals and the government, that "[t]he statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group." *Humanitarian Law Project*, 205 F.3d at 1133; see Gov't Br. 15. Rather, what the statute "prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism." *Humanitarian Law Project*, 205 F.3d at 1133. Petitioners are therefore incorrect that Section 2339 penalizes "association plus something more." Reply Br. 38. What the statute penalizes is only the "something more"—*i.e.*, not mere membership or association, but only the act of rendering material support, in the form of property or services, to foreign terrorists.

2. Petitioners are also incorrect that "the government simply redefines 'peaceably assembling with members of the PKK and LTTE for lawful discussion' of human rights advocacy and peacemaking as a 'service.'" Reply Br. 37. The government made clear in its opening brief that "Section 2339B * * * does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion." Br. 61. Petitioners may join the PKK and LTTE, gather with those groups' members, and discuss subjects of mutual interest. Petitioners filed the present suit for injunctive relief, however, because they want to do more than engage in discussion with terrorist groups. Specifically, petitioners want to train the PKK and LTTE on how to appear before international bodies; assist those groups at international meetings and conferences; and offer medical care, economic development services and information technology to those groups and their members. J.A. 58-63.

That fact distinguishes the present case from *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). The defendant in *De Jonge* was not charged with the kind of acts that petitioners wish to perform. Rather, "[h]is sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." *Ibid.* This Court set aside the defendant's conviction, holding that he could not be punished solely for exercising his First Amendment right to engage in "peaceable assembly for lawful discussion." *Id.* at 365. Section 2339B accords with that principle: it does not prohibit petitioners from peaceably assembling with foreign terrorist organizations for lawful discussion. Nothing in *De Jonge* suggests that Congress may not prohibit petitioners from the additional act, separate from peaceable discussion, of providing material support to groups with a demonstrated willingness to engage in terrorism.

3. Finally, petitioners ignore the effect of the international context on their claims. Although this Court has not confronted the issue in the context of associational rights, this Court and other courts have recognized the "longstanding right of the sovereign to protect itself." *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977). As a corollary to that right, this Court and other courts have consistently recognized the authority of the political Branches to restrict individuals from dealing with foreign governments whose actions are deemed to be inimical to American interests. See, *e.g.*, *Wald*, 468 U.S. at 242-243 (rejecting Fifth Amendment challenge to President's decision to curtail travel to Cuba); *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965) (holding that a United States citizen lacked any First Amendment right to travel to Cuba to gather information); *Veterans & Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs*, 459 F.2d 676, 681-684 (3d Cir.) (upholding Trading with the Enemy Act and Foreign Assets Control Regulations against First Amendment claim to re-

ceive foreign literature), cert. denied, 409 U.S. 933 (1972).

The principle is as relevant to foreign terrorist organizations as to foreign governments: the foreign affairs powers of the political Branches include substantial authority, of just the kind Congress exercised in enacting the material-support statute, to restrict individuals from providing aid to foreign entities that threaten harm to this Nation's interests. See *Zemel*, 381 U.S. at 16 ("[T]he restriction which is challenged in this case is supported by the weightiest considerations of national security."); *Regan*, 468 U.S. at 242 ("Our holding in *Zemel* was merely an example of this classical deference to the political branches in matters of foreign policy."); *ibid.* (upholding Cuban travel ban as "justified by weighty concerns of foreign policy"). Individuals are subject to limitations in their relations with foreign governments and entities that differ from any found in the domestic setting. See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). So even assuming that petitioners have some right of association to provide material support to domestic terrorist organizations, no such right should exist in the international context. And because the speech rights that petitioners have asserted in this case largely collapse into their claim of associational rights (given that the material support statute does not limit their independent advocacy), petitioners' speech claims fail for the same reason.

III. THE MATERIAL-SUPPORT STATUTE'S RESTRICTIONS ON PROVIDING AID DO NOT REQUIRE SPECIFIC INTENT TO FURTHER THE TERRORIST ORGANIZATION'S UNLAWFUL ACTIVITIES

1. Before the lower courts, petitioners claimed that the material-support statute violates the Fifth Amendment's Due Process Clause unless it is interpreted to require specific intent to further a terrorist organization's unlawful activities. Before this Court, petitioners relegate that claim to a pair of footnotes (Br. 43 n.23; Reply Br. 36 n.17) that seek to incorporate by reference their arguments before the court of appeals. That strategy "is not enough to raise the question fairly" for this Court's consideration. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004).

Before this Court, petitioners press a different argument: that interpreting the material-support statute to require proof of specific intent would avoid resolution of all their constitutional claims. Contrary to their contention (Reply Br. 39 n.19), petitioners did not raise that argument below. The "constitutional infirmity" that they previously urged the court of appeals to avoid was imposing guilt by association in violation of the Fifth Amendment. Pet. C.A. Reply Br. 11-19; see Pet. C.A. Br. 19-37. That is precisely the claim that petitioners have failed to preserve here.

2. As the government has explained (Br. 63), petitioners' proposed specific intent requirement would not cure the First Amendment problems that they perceive. Petitioners agree with this much, saying only that if the challenged provisions are interpreted to require specific intent, "the injunction against applying the provisions to plaintiffs' proposed speech could be sustained on statutory grounds," and the Court would not have to reach

the constitutional questions in this case. Reply Br. 40. But the government has not conceded that all the petitioners currently lack, or will lack in the future, the specific intent to further unlawful terrorist activities. See Anti-Defamation League Amicus Br. 23 (describing how one of the petitioners, the World Tamil Coordinating Committee, assists in raising funds for the LTTE). If petitioners have this intent, their avoidance strategy will avoid nothing at all in this case (let alone in any others): they will continue to press their vagueness claims.

3. Nor is petitioners' proposal to amend the statute as modest as they try to make it appear. Petitioners argue that this Court should construe "the challenged provisions" to require specific intent. Reply Br. 40. But they do not explain why a specific intent requirement would apply only to challenged terms like "training," "expert advice or assistance," "personnel," or "service." Earlier in this litigation, petitioners sought to give financial support to the PKK and LTTE, see *id.* at 32 n.14; they do not concede (*ibid.*) that the statute is constitutional as applied to monetary contributions; and nothing will prevent others from arguing in the future that monetary contributions also have a communicative element. By petitioners' logic, any provision of the statute capable of reaching conduct with an expressive component should require proof of specific intent.

Moreover, petitioners incorrectly argue that this Court can construe the challenged terms to require specific intent only when they are "applied to speech." Reply Br. 40; see *id.* at 41-42. But in *Clark* v. *Martinez*, 543 U.S. 371 (2005), this Court held that when a statute is given a limiting construction to avoid constitutional concerns, that construction applies to future cases "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 381. Contrary to petitioners' proposal, the meaning of the terms in the material-support statute cannot vary depending on whether they are being "applied to speech." If petitioners are correct, then all prosecutions for rendering particular types of material support to foreign terrorists will require proof of specific intent.

4. Finally, and most importantly, petitioners' interpretation conflicts with Congress's intent. Congress adopted a specific intent requirement in Sections 2339A and 2339C, but not in Section 2339B. Petitioners argue (Reply Br. 41-42) that there is no evidence Congress deliberately rejected such a requirement in Section 2339B, but that is not the case. Congress amended Section 2339B years after the enactment of Sections 2339A and 2339C, yet it opted for a different scienter requirement that does not require specific intent—and it did so in the face of a judicial conflict over that very issue. See Gov't Br. 65. Congress apparently thought that Section 2339A's prohibition on providing material support to terrorists was not sufficiently effective, and it therefore chose not to replicate the provision's specific intent requirement. See CACL Amicus Br. 8-9. Indeed, if Section 2339B were interpreted to include a specific intent requirement, it would become almost wholly duplicative of Section 2339A. In those circumstances, petitioners' request for avoidance amounts to little more than "a license * * * to rewrite language enacted by the legislature." *Albertini*, 472 U.S. at 680.

* * * * *

The judgment of the court of appeals should be reversed insofar as it held certain terms in Sections 2339A and 2339B unconstitutionally vague and in all other respects affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

FEBRUARY 2010

AMICUS
CURIAE
BRIEF

144 11 8

Nos. 08-1498 & 09-89

Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Petitioners,

v.

HUMANITARIAN LAW PROJECT, *et al.*,

Respondents.

HUMANITARIAN LAW PROJECT, *et al.*,

Cross-Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ACADEMIC RESEARCHERS AND THE CITIZEN MEDIA LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

TC w/ TA
5952EF

SIDNEY S. ROSDEITCHER
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

BURT NEUBORNE
Counsel of Record
ELIZABETH GOITEIN
EMILY BERMAN
DAVID UDELL
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

935a

41

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE MATERIAL SUPPORT STATUTE IS UNCONSTITUTIONALLY VAGUE AND COULD CHILL PROTECTED SPEECH ... 10

II. THE APPLICATION OF THE STATUTE TO PURE SPEECH THAT HAS NEITHER THE PURPOSE NOR EFFECT OF AIDING TERRORIST GROUPS' UNLAWFUL ACTIVITIES VIOLATES THE FIRST AND FIFTH AMENDMENTS 24

III. THE COURT SHOULD READ THE MATERIAL SUPPORT STATUTE, WHEN APPLIED TO PURE SPEECH, TO REQUIRE BOTH A SPECIFIC INTENT TO FURTHER AN UNLAWFUL END AND A LIKELIHOOD OF HARM.......................... 28

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Abuelhawa v. United States,
129 S. Ct. 2102 (2009) 32

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 28

Aptheker v. Secretary of State,
378 U.S. 500 (1964) 30

Baggett v. Bullitt,
377 U.S. 360 (1964) 11

Brandenburg v. Ohio,
395 U.S. 444 (1969) 24

Bridges v. California,
314 U.S. 252 (1941) 24

City of Lakewood v. Plain Dealer Pub. Co.,
486 U.S. 750 (1988) 11

Crowell v. Benson,
285 U.S. 22 (1932) 28

Dennis v. United States,
341 U.S. 494 (1951) 24, 25

Edward J. DeBartolo v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 28

Elfbrandt v. Russell,
384 U.S. 11 (1966) 25, 33

Foti v. City of Menlo Park,
146 F.3d 629 (9th Cir. 1998) 11

Grayned v. City of Rockford,
408 U.S. 104 (1972) 11

Herndon v. Lowry,
301 U.S. 242 (1937) 23, 24

Humanitarian Law Project v. Mukasey,
552 F.3d 916 (9th Cir. 2009) 11, 25, 30

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 11

Lorillard v. Pons,
434 U.S. 575 (1978) 32

NAACP v. Button,
371 U.S. 415 (1963) 11

Public Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 28

Scales v. United States,
367 U.S. 203 (1961) ....*passim*

Smith v. Goguen,
415 U.S. 566 (1974) 11, 23

Texas v. Johnson,
491 U.S. 397 (1989) 24

United States v. Del. & Hudson Co.,
213 U.S. 366 (1909) 29

United States v. O'Brien,
391 U.S. 367 (1968) 26, 27

United States v. Robel,
389 U.S. 258 (1967) 30, 33

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971) 28

Yates v. United States,
354 U.S. 298 (1957) 29, 31

Statutes & Legislative Material

8 U.S.C. § 1189(a)(1) 1, 16

18 U.S.C. § 2339B 1

18 U.S.C. § 2339B(a)(1) 19, 32

18 U.S.C. § 2339B(h) 21

18 U.S.C. § 2339B(i) 20, 33

18 U.S.C. § 2385 29

H.R. Rep. No. 104-518 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 944 32

Other Authorities

American Society of News Editors' Statement of Principles 13

Associated Press Managing Editors, Statement of Ethical Principles 13

H. Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (4th ed. 2006) 12

Andrea Elliott, *A Call to Jihad Answered in America*, N.Y. Times, July 12, 2009, at A1 17

Clifford Geertz, *The Interpretation of Cultures* (1973) 12

Michael Genzuk, *A Synthesis of Ethnographic Research* (Occasional Paper Series, Center for Multilingual, Multicultural Research, Rossier School of Education, University of Southern California, 2003), *available at*

http://www.rcf.usc.edu/~genzuk/Ethnographic_Research.html 12

Hearst Newspapers: Statement of Professional Principles 13

Inside the Jihad: Coverage by Michael Moss and Sauad Mekhennet, N.Y. Times, *available at* http://topics.nytimes.com/topics/news/international/series/insidethejihad/index.html.. 15

Mousa Abu Marzook, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at A15 17

Souad Mekhennet, Michael Moss, Eric Schmitt, Elaine Sciolino, & Margot Williams, *Ragtag Insurgency Gains a Lifeline From Al Qaeda*, N.Y. Times, July 1, 2008, at A1 15

Serena Nanda & Richard L. Warms, *Cultural Anthropology* (9th ed. 2006) 12

'New' al Qaeda Tape May Contain Old Clip of bin Laden, CNN.com, July 15, 2007 17

Press Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge At Military Commission Trial (Nov. 3, 2008), *available* at http://www.defenselink.mil/releases/release.aspx?releaseid=12329 18

Reuters, Handbook of Journalism (2008), *available at* http://handbook.reuters.com/extensions/docs/pdf/handbookofjournalism.pdf 13

Society of Professional Journalists, Code of Ethics (1996) 13

Adrian Vermeule, *Saving Constructions*, 85 Geo. L. J. 1945 (1997) 29

Webster's Third New International Dictionary of the English Language (1993) 21

Ahmed Yousef, *Engage With Hamas; We Earned Our Support*, Wash. Post, June 20, 2007, at A19...... 18

Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19.. 18

Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23 18

INTEREST OF *AMICI CURIAE*[1]

Amici are academic researchers and a professional association representing the interests of journalists who work in fields requiring professional contact with a wide variety of foreign groups, some of which have been or may be designated as foreign terrorist organizations by the United States government pursuant to 8 U.S.C. § 1189(a)(1). Sustained verbal communication with, or concerning, such groups is often essential to the successful performance of these researchers' and journalists' professional responsibilities, which in turn enhances public understanding on issues of vital international importance. If this Court endorses the government's position concerning the broad reach and constitutionality of 18 U.S.C. § 2339B, which criminalizes the provision of "material support or resources" to proscribed groups, these individuals will be forced to carry out their professional activities in a climate of fear and uncertainty because, given the statute's vague and amorphous prohibitions, it is impossible to predict whether a given well-intentioned communication might be construed by the government as falling within the statutory prohibition.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

Amici urge the Court to provide effective and constitutionally adequate protection for speakers whose professional duties require them to communicate with, or about, proscribed groups for purely lawful purposes. Such protection could be provided by construing the ban on "material support or resources" to apply only to communications that are (1) intended to advance the proscribed groups' unlawful activities; and (2) likely to have such an effect. If the Court finds that the statute's text resists such a saving construction, it should invalidate the statute's application to the speech at issue in this case as violative of the First and Fifth Amendments to the United States Constitution.

Amici include the following:

Lori Allen is Lecturer in Contemporary Middle Eastern Politics and Society in the Department of Middle Eastern Studies, University of Cambridge, UK. She is currently an Academy Scholar at the Harvard Academy for International and Area Studies, where she is writing a book about human rights and the politics of suffering in Palestinian nationalism entitled *Victims of Politics: Human Rights Contradictions and the Paradox of Palestine*. In addition to a number of articles published in *Middle East Report*, recent publications include articles in *Cultural Anthropology*, *American Ethnologist*, and *Arab Studies Journal*. Her research has been supported by grants and fellowships from Brown University, the United States Institute of Peace, the Harry Frank Guggenheim Foundation, the Woodrow Wilson National Fellowship

Foundation, the Social Science Research Council, and the British Academy, among others.

Danny Hoffman is an Assistant Professor of Anthropology at the University of Washington in Seattle. Dr. Hoffman's ethnographic research focuses on youth and contemporary militia movements in Sierra Leone and Liberia. His work has been published in European and American journals devoted to African Studies, Anthropology, Cultural Studies and Political Science. In 2006, Dr. Hoffman served as an expert witness for the United Nations war crimes tribunal in Sierra Leone following fieldwork with that country's Civil Defense Forces militia.

Louis Kriesberg is Professor Emeritus of Sociology, Maxwell Professor Emeritus of Social Conflict Studies, and founding director of the Program on the Analysis and Resolution of Conflicts (1986–1994), all at Syracuse University. In addition to over 125 book chapters and articles, his published books include: *Conflict Transformation and Peacebuilding* (co-ed., 2009); *Constructive Conflicts* (1998, 2003, 2007); *International Conflict Resolution* (1992); *Timing the De-Escalation of International Conflicts* (co-ed., 1991); *Intractable Conflicts and Their Transformation* (co-ed., 1989); *Social Conflicts* (1973, 1982); *Social Inequality* (1979); *Mothers in Poverty* (1970); *Social Processes in International Relations* (ed., 1968); and *Research in Social Movements, Conflicts and Change* (ed., Vols. 1-14, 1978-1992). He was President of the Society for the Study of Social Problems (1983–1984), and he lectures, consults, and provides training regarding conflict resolution, security issues, and peace studies.

Carolyn Nordstrom is Professor of Anthropology at the University of Notre Dame. Her principle areas of interest are political violence and peace, transnational extra-legal economies, and globalization. She has conducted extensive in-site fieldwork in war zones worldwide, with long-term interests in Southern Africa and South Asia. Her books include: *Global Outlaws: Crime, Money, and Power in the Contemporary World* (2007); *Shadows of War: Violence, Power and International Profiteering in the 21st Century* (2004); *A Different Kind of War Story* (1997); and the edited volumes: *Fieldwork Under Fire: Contemporary Stories of Violence and Survival* (1996); and *The Paths to Domination, Resistance, and Terror* (1992). She has authored dozens of scholarly articles, won several teaching awards, and has recently been awarded John D. and Catherine T. MacArthur and John Simon Guggenheim Fellowships.

Mary Ellen O'Connell holds the Robert and Marion Short Chair in Law and is Research Professor of International Dispute Resolution—Kroc Institute for Peace Studies at the University of Notre Dame. Professor O'Connell chairs the Use of Force Committee of the International Law Association. She came to Notre Dame from The Ohio State University, where she held a joint appointment in the law school and the Mershon Center for International Security Studies. She has also taught for the United States Department of Defense at the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany and the Johns Hopkins University Nitze School for Advanced International Studies in Bologna, Italy. She is the author of, among other works, *International Law and the Use of Force, Cases and Materials* (2d ed. 2009); *The Power and Purpose of International Law* (2008); and *Redefining Sovereignty: The Use of Force After the Cold War* (with M. Bothe and N. Ronzitti, 2005).

William Reno is an Associate Professor of Political Science at Northwestern University. He studies the organization and behavior of insurgent groups in Sub-Saharan Africa, and has conducted recent field research in Sudan and Somalia. He is the author of the books *Corruption and State Politics in Sierra Leone* (1995) and *Warlord Politics and African States* (1999). In addition, he is the author of multiple articles and book chapters on the subject of collapsing states and warfare in post-state societies.

Robert A. Rubinstein is Professor of Anthropology and International Relations at the Maxwell School of Syracuse University, where from 1994-2005 he directed the Program on the Analysis and Resolution of Conflicts. His research focuses on the dynamics of peacekeeping, stability operations, post-conflict reconstruction, and conflict management. He is the author of *Peacekeeping Under Fire: Culture and Intervention* (2008), and co-editor of the collections *The Social Dynamics of Peace and Conflict: Culture in International Security* (1988) and *Peace and War:*

Cross-Cultural Perspectives (1986). In addition, he has published 100 journal articles and book chapters, and has authored or edited eight books. His work has been supported by numerous foundations, including the Ford Foundation, National Science Foundation, the John and Flora Hewlett Foundation, the United States Institute of Peace, and the Wenner-Gren Foundation for Anthropological Research.

Robert D. Sloane is Associate Professor of Law at the Boston University School of Law. His current research focuses on the laws of war and the use and limits of criminal law concepts in international law. He has published in the fields of public international law, human rights, international criminal law, asylum law, and international arbitration. As a practitioner, he worked for the International Committee of Lawyers for Tibet (now known as Tibet Justice Center), in which capacity he led fact-finding missions to Nepal, India, and Tibet, wrote submissions for the U.N. Commission on Human Rights and human rights treaty bodies, represented asylum seekers, and published several reports and law journal articles on human rights.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development; and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as *amicus curiae* in several cases concerning legal issues of importance to the media.

INTRODUCTION AND SUMMARY OF ARGUMENT

The world has become increasingly and irreversibly globalized. In nearly every aspect of public life—our environment, our economy, our communications, our security—actions and events in far-flung places may have significant impact on the lives of Americans, and *vice versa*. A crisis in Wall Street banks spurs precipitous drops in European and Asian financial markets and bankruptcy in Iceland. Hatred and incitement in Afghanistan leads to murderous attacks in New York. The razing of South American rain forests and the industrialization of developing nations combine with the West's own pollution to increase carbon emissions and lead to ever more devastating hurricane seasons on the American Gulf Coast. Deterioration of nuclear security in the former Soviet Union raises concerns within this country over nuclear proliferation and bombs in the hands of non-state actors.

In the face of these varied and daunting transnational challenges, it has never been more important for the members of our self-governing society to have access to information about the events, entities, and persons that are shaping those challenges. Only a well-informed public can engage in reasoned debates about foreign relations, national security policy, climate change legislation, or financial regulation. This means learning not only about the views and actions of foreign leaders, but also about those of their opponents—whether those opponents are the youth of Iran pressing for a more open society, or extremist religious fanatics pressing for a more oppressive one.

Academic researchers and journalists play a crucial role in the collection, analysis, and dissemination of this vital information. Only with the facts and perspectives that their work provides can we understand the forces at play in remote and unfamiliar places. In providing this information, they not only enrich public discourse; they facilitate the development of more effective national policy, foreign policy, and counterterrorism efforts. They must therefore be permitted to travel, to interact responsibly with people from all sectors of society, and to report freely on what they discover without the specter of criminal prosecution hanging over their heads.

The outcome of this case will affect the ability of researchers and journalists to do their vital work. In furtherance of their professional duties, *Amici* and their colleagues must communicate with or about groups that are or may become designated foreign terrorist organizations.[2] Absent a narrowing construction, the statute provides insufficient clarity for these individuals to ascertain with confidence whether a given communication could be construed as falling within the statute's prohibition. If this Court upholds the vague and extremely broad terms of the statute, many researchers and journalists will feel compelled to err on the side of caution, restricting their lawful communications and diluting the public discourse. Moreover, significant potential exists for the government to exploit the statute's vagueness to target disfavored scholarship or reporting. This combined risk of self-censorship and selective application of the statute cannot be squared with the dictates of the First and Fifth Amendments to the U.S. Constitution.

---

[2] In the case of organizational *Amicus*, the communication is on the part of the organization's members and beneficiaries.

Even aside from the statute's unconstitutional vagueness, applying it to pure speech that has neither the purpose nor likely effect of furthering a designated terrorist group's unlawful ends would run afoul of the First and Fifth Amendments. This Court has acknowledged that the government may not curtail pure speech unless there is a close causal nexus between the speech and an extremely serious harm the government is empowered to prevent. No plausible nexus has been posited between pure speech, of the kind in which Respondents/Cross-Petitioners and *Amici* engage, and the ability of terrorist groups to do harm. Moreover, where an individual associates with a group that engages in both lawful and unlawful activities, such association cannot be punished absent a specific intent on the part of the individual to further the group's unlawful aims. A contrary holding would offend the First and Fifth Amendments and threaten the very basis of *Amici*'s academic and journalistic pursuits.

Accordingly, *Amici* urge the Court to resolve the constitutional infirmities of the statute through a narrowing construction that allows speech to be penalized only where it has the purpose and likely effect of furthering the illegal activities of designated terrorist groups. The lower courts' assessment that such a narrowing construction is unnecessary was based on a misreading of *Scales v. United States*, 367 U.S. 203 (1961), which in fact provides strong support for such an approach here. If such a narrowing construction is deemed impossible, the Court should declare the statute unconstitutional as applied to speech that lacks the purpose and likely effect of advancing a proscribed group's unlawful ends.

ARGUMENT

I. THE MATERIAL SUPPORT STATUTE IS UNCONSTITUTIONALLY VAGUE AND COULD CHILL PROTECTED SPEECH

Respondents/Cross-Petitioners challenge several provisions of the material support statute as being unconstitutionally vague, while the United States argues that these provisions provide tolerably fair notice of the statute's scope. The courts below split the difference, holding that certain terms give fair notice, and certain terms do not. Parsing each challenged prohibited category and sub-category, the courts distinguished particularly amorphous categories like "service," "training," and "expert advice" based on "specialized knowledge" from marginally less amorphous categories like "personnel" and "expert advice" based on "scientific" or "technical" knowledge, and enjoined the United States from enforcing the more amorphous categories against Respondents'/Cross-Petitioners' proposed speech. *See Humanitarian Law Project v. Mukasey,* 552 F.3d 916, 927-31 (9th Cir. 2009).

With respect, however, the lower courts did not sufficiently heed their own exhortation regarding how First Amendment considerations should affect the void-for-vagueness analysis. When, as here, a statute may touch on protected speech,[3] it must do more than "clearly delineate the conduct [it] proscribe[s]," *Humanitarian Law Project,* 552 F.3d at 928; it must do so "with narrow specificity." *Foti v. City of Menlo Park,* 146 F.3d 629, 638-39 (9th Cir. 1998) (citing *NAACP v. Button,* 371 U.S. 415, 432-33 (1963)). The purpose of this heightened specificity requirement is twofold: (1) to avoid the risk of widespread self-censorship caused by uncertainty and fear; and (2) to prevent the United States from exercising virtually unfettered discretion over which speech should be prosecuted. *See Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972); *see also Keyishian v. Board of Regents,* 385 U.S. 589, 603-04 (1967) (self-censorship); *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964) (same); *Smith v. Goguen,* 415 U.S. 566, 575 (1974) (prosecutorial discretion); *cf. City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750,

---

[3] The First Amendment vagueness doctrine is triggered whenever "a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment." *Smith v. Goguen,* 415 U.S. 566, 573 (1974).

757 (1988) (parallel dangers in standardless licensing scheme).

These risks clearly are present here. As a threshold matter, scholars in many disciplines must be able to communicate with the subjects of their study in order to perform responsible research. Anthropology is a primary example. The discipline of anthropology is aimed at illuminating other cultures, ranging from small, geographically distinct units (such as a particular tribe) to broader cultural phenomena (such as war itself). *See generally* Serena Nanda & Richard L. Warms, *Cultural Anthropology* (9th ed. 2006). The primary vehicle for achieving this aim is ethnographic research, or fieldwork involving the collection of primary data. And while there are many tools that may be involved in such research, one of the most important tools is direct personal observation of—and extended interactive interviews with—members of the culture being studied. *See* H. Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* 342, 347, 368-69 (4th ed. 2006); Michael Genzuk, *A Synthesis of Ethnographic Research* (Occasional Paper Series, Center for Multilingual, Multicultural Research, Rossier School of Education, University of Southern California, 2003), *available at* http://www-rcf.usc.edu/~genzuk/Ethnographic_Research.html. It is, indeed, a longstanding and fundamental tenet of anthropology that direct, sustained contact is vital to gaining a full and accurate understanding of the culture in question. *See* Clifford Geertz, *The Interpretation of Cultures* 22 (1973)

("Anthropologists don't study villages . . . they study *in* villages.") (emphasis in original).

Journalists similarly must be able to communicate with the persons and groups about whom they report. The competent, ethical practice of journalism requires reporters to make every effort to ensure that "news content is accurate, free from bias and in context, and that all sides are presented fairly." American Society of News Editors' Statement of Principles, Art. IV. This means making efforts to "[t]alk to sources on all sides of a deal, dispute, negotiation or conflict." Reuters, Handbook of Journalism 3 (2008), *available at* http://handbook.reuters.com/extensions/docs/pdf/handbookofjournalism.pdf. When a story paints an individual in a negative light or deals with controversial issues, this principle is especially important. *See, e.g.*, Hearst Newspapers: Statement of Professional Principles ("We must make a particular effort to seek comment from those portrayed in a critical manner."); Society of Professional Journalists, Code of Ethics (1996) ("Journalists should . . . [d]iligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing."); Associated Press Managing Editors, Statement of Ethical Principles ("The newspaper should strive for impartial treatment of issues and dispassionate handling of controversial subjects.").

Accordingly, in order to study or report competently on terrorism or terrorist groups, academic researchers and journalists must be able to communicate with those groups or their members. There can be no serious question regarding the importance of this work. Among other things, a rich understanding of the phenomenon of modern terrorism is vital to our own government's ability to develop effective responses to the terrorist threat. If the Court were to uphold the statutory terms at issue in this case, however, *Amici* would be left to guess whether activities like the following could conceivably fall within the statute's ambit:

- *Amici* include an anthropologist who studies peacekeeping missions and the effect of both internal and external culture on the missions' success. In order to determine how local culture affects any given peacekeeping mission, this researcher engages in in-depth interviews and "participant observation" of the local population, ranging from those who support the mission to those who may engage in armed opposition as part of an organized insurgency. In communicating his findings through scholarly writings, he routinely presents the views of the people and groups whom he has studied. This individual's work has been of direct benefit to the U.S. government and he has been invited to the U.S. Army War College as a "distinguished visitor." Yet if the armed insurgents whom he studies were to be classified as foreign terrorist organizations by the U.S. government, could his extended interactions with them and his presentation of their views be construed by the government as the provision of a "service" or "personnel"?

- One major U.S. daily newspaper published a series of articles about jihadists, aiming to "examine how they are working to expand the reach of radical Islam." *Inside the Jihad: Coverage by Michael Moss and Sauad Mekhennet*, N.Y. Times, *available at* http://topics.nytimes.com/topics/news/international/series/insidethejihad/index.html. An article in the series focused on a foundering militant group, currently designated by the U.S. government as a foreign terrorist organization, that reached out to Al Qaeda for support and resources. *See* Souad Mekhennet, Michael Moss, Eric Schmitt, Elaine Sciolino, & Margot Williams, *Ragtag Insurgency Gains a Lifeline From Al Qaeda*, N.Y. Times, July 1, 2008, at A1. This reporting required significant contact with the militants, and it included stories from inside the organization regarding members' motivations, activities, and political views. The online version of the story included a link to audio clips from an interview with the militant group's leader, Abdelmalek Droukdal. Could the government deem the airing of this interview, and the presentation of the group's views, to be a "service" provided to the organization?

- *Amici* include an anthropologist who does intensive field research in conflict zones. He has studied the Civil Defense Forces (CDF) and the Revolutionary United Front (RUF) in Sierra Leone and Liberians United for Reconciliation and Democracy (LURD) in Liberia, among other groups. As an integral part of his research, he has spent extended periods of time with the combatants he has studied, including living with them on occasion in order to maximize his observational opportunities. His work has resulted in important insights on why some groups target civilians for attack, and he served as an expert witness for the United Nations at the Special Court in Sierra Leone. Yet the groups of greatest interest to his work include those that arguably meet the government's definition of foreign terrorist organizations and are likely candidates for designation under 8 U.S.C. § 1189(a)(1). Could he run afoul of the "personnel" or "service" provisions of the material support statute by virtue of his extended and close interactions with them?

- Media associations regularly organize international newsgathering trips to countries of interest. These trips permit the associations' members to extend the reach of their international coverage beyond what otherwise would be possible, thus enriching their reporting to the public. The association arranges a series of interview sessions in the destination country, including interviews with the nation's leadership. Trips to Cuba and Venezuela have included meetings or press conferences with Fidel Castro and Hugo Chavez, respectively. Should such an excursion be arranged in Lebanon, and should the participants interview, write about, and quote members of Hezbollah, would they be exposing themselves to criminal liability for knowingly providing a "service" to Hezbollah?

- *Amici* include an anthropologist who developed one of the first contemporary ethnographies of war. She spent years on the front lines of various conflicts, conducting extensive interviews with members of groups such as the LTTE (the "Tamil Tigers"), the Irish Republican Army (IRA), and the Palestine Liberation Organization (PLO). Her research has enabled her to predict accurately the course of a wide range of contemporary armed conflicts—an ability of obvious and significant public value. But this ability is the result of close and continuous interaction with groups that include designated foreign terrorist organizations, and she is deeply concerned about the possible effect of the material support statute on her future work.

- Media outlets regularly post or broadcast documents and videos produced and distributed by designated foreign terrorist organizations. *See, e.g.*, Andrea Elliott, *A Call to Jihad Answered in America*, N.Y. Times, July 12, 2009, at A1 (link to propaganda film by a Somali terror sect on online version of article), *available at* http://www.nytimes.com/2009/07/12/us/12somalis.html; *'New' al Qaeda Tape May Contain Old Clip of bin Laden*, CNN.com, July 15, 2007 (story about Osama bin Laden videotape includes link to the video), *available at* http://www.cnn.com/2007/WORLD/meast/07/14/bin.laden.video/index.html#cnnSTCVideo. U.S. newspapers also occasionally publish opinion pieces of informational value to the public written by representatives of designated foreign terrorist organizations. *See, e.g.*, Mousa Abu Marzook, *Hamas Speaks*, L.A. Times, Jan 6, 2009, at A15 (Deputy of the Political Bureau of Hamas); Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23 (a founder of Hamas); Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19 (political adviser to Prime Minister Ismail Haniya); Ahmed Yousef, *Engage With Hamas; We Earned Our Support*, Wash. Post, June 20, 2007, at A19 (same). In light of the fact that the government has successfully prosecuted at least one Al Qaeda member under the material support statute for creating and disseminating a propagandist videotape, *see* Press Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge At Military Commission Trial (Nov. 3, 2008), *available* at http://www.defenselink.mil/releases/release.aspx?releaseid=12329, can journalists be confident that they may broadcast clips of such videos or otherwise provide a forum in which terrorist groups air their views without risking criminal prosecution?

- *Amici* include an anthropologist who studies the manner in which ordinary Palestinians respond to the pervasive, ongoing violence that surrounds them. As part of her research, she has walked alongside marchers in so-called "martyr funerals," public events honoring those who have died in the Israeli-Palestinian conflict, including suicide bombers. By walking alongside the marchers, rather than simply observing from afar, she is able to engage in frank conversation with the participants and to overhear their conversations with one another. As a result, she

> has learned that there is a deep wave of cynicism and apathy about the conflict among the general population. This information is of clear value in shaping our country's own approach to the conflict. Yet to the extent some of these funerals may be organized by Hamas or other designated terrorist groups, could the government decide that she is providing "personnel" by virtue of walking alongside the marchers?

The limitations that Congress has added to the statute do little to allay the concerns of the individuals or groups engaged in these or similar activities because those limitations provide inadequate assistance in determining the statute's scope. The knowledge requirement added by Congress[4] sheds light on the statute's substantive terms, such as "service," only if it is interpreted to require a specific intent to further the terrorist organization's illegal aims (*see* Part III, *infra*). As for Congress's instruction that the statute should not be construed to apply to speech protected by the

---

[4] This provision states:

> To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

18 U.S.C. § 2339B(a)(1).

First Amendment,[5] this provision is scant solace to a prospective speaker who is uncertain about whether his or her speech falls outside the not-always-obvious parameters of First Amendment protection. These parameters are indeed contested by the parties in this case, each of which is represented by learned counsel. Academic researchers and journalists who communicate with or about foreign terrorist organizations cannot be expected to enjoy any greater certainty.

Nor do Congress's definitions of the statutory terms at issue provide much assistance. When it comes to support in the form of "personnel," for example, Congress has specified that this provision applies to those who work "under th[e] terrorist organization's direction or control or [who] organize, manage, supervise, or otherwise direct the operation of that organization," and it has exempted speakers operating "entirely independently" from the organization.[6] But the specification is itself

---

[5] The proviso states: "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." 18 U.S.C. § 2339B(i).

[6] The provision states in full:

> No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist

hopelessly vague, especially when applied to scholars and reporters engaged in research and reporting that entail substantial interaction with members of a proscribed group. Does a newspaper act "entirely independently" when it performs the work of editing an op-ed submitted by a terrorist leader, if the leader retains ultimate control over the content of the piece? Does a researcher act "entirely independently" when she attends an event organized by a terrorist group in order to observe and interview its members, given that the event itself takes place under the group's "direction or control"? Moreover, since the "entirely independently" limitation applies only to material support in the form of "personnel," any researcher or journalist who acts "entirely independently" when providing anything that could be deemed a "service" or "expert advice or assistance"—including any "specialized knowledge"—still risks criminal prosecution.

The government's construction of the term "service" is even less illuminating. In the briefing for this case, the government has pointed to the definitions of "service" contained in Webster's Dictionary: "[A]n act done for the benefit or at the command of another" or "useful labor that does not produce a tangible commodity." Pet. at 17 (citing *Webster's Third New International Dictionary of the English Language* 2075 (1993)). These definitions raise more questions than answers. If the leader of a

---

> organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h).

terrorist group dictates the time and place at which a journalist can meet him for an interview, is the act of showing up at the appointed time and place "an act done . . . at the command of another"? If a cultural anthropologist writes an article about a lesser-known terrorist group and thus raises the group's profile, could the act of writing the article constitute "useful labor"?

As the above examples show, it is impossible for prospective speakers to know whether a broad range of innocent communications with, or concerning, a designated group will be deemed the provision of material support. If the vague terms of the statute are allowed to stand, some researchers and journalists presumably will continue their work out of a sense of public duty and professional integrity. Without question, however, there will be others who conclude that the risks are simply too great. Such a result will not only harm the speakers themselves; it will result in an impoverished public understanding and discourse regarding some of the most important issues of our day—including the issue of terrorism.

Equally troubling, the vagueness inherent in the statute gives the United States virtually unfettered discretion to target disfavored speech as the provision of forbidden material support to a proscribed group. For example, the government could decide to construe the term "service" to include a news outlet's reporting of a terrorist leader's views—but only where the government perceives that the news outlet in question has given the government's policies unfavorable coverage in the past. Similarly, a scholar whose studies suggest that dialogue with terrorist groups is an effective method of deterring violence might be more likely, when compared to a scholar whose studies reach the opposite conclusion, to find her communications targeted by a government intent on combating terrorist groups through a controversial armed conflict.

This Court has not hesitated to invalidate statutes under analogous circumstances. In *Herndon v. Lowry*, 301 U.S. 242 (1937), the Court vacated the conviction of a Communist Party organizer under a Georgia statute criminalizing the act of inciting violent overthrow of the government. The Court ruled that the statute was unconstitutionally vague because it failed to distinguish sufficiently between advocacy and incitement, thus vesting prosecutors and the jury with undue discretion to criminalize a broad swath of speech. *See Herndon*, 301 U.S. at 261-64. Similarly, in *Smith v. Goguen*, 415 U.S. 566 (1974), the Court struck down as unconstitutionally vague a Massachusetts statute that forbade any person to "treat[] contemptuously" the American flag—in large part because "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575.

None of the challenged categories in the material support statute can survive analysis under *Herndon* and *Smith*, or the dozens of Supreme Court cases applying their teaching. In the end, the threat of self-censorship and unfettered prosecutorial discretion to single out disfavored speech for criminal prosecution combine to generate a toxic speech climate that violates the First Amendment vagueness doctrine.

II. THE APPLICATION OF THE STATUTE TO PURE SPEECH THAT HAS NEITHER THE PURPOSE NOR EFFECT OF AIDING TERRORIST GROUPS' UNLAWFUL ACTIVITIES VIOLATES THE FIRST AND FIFTH AMENDMENTS

The key to modern free speech protection is the shift from a willingness in the first quarter of the 20th century to suppress controversial speech merely because it had a perceived tendency to lead to harmful behavior, to the current requirement that the government demonstrate a direct causal nexus between the target speech and an extremely serious harm that the government is empowered to prevent. *See, e.g.*, *Herndon*, 301 U.S. at 255-59; *Bridges v. California*, 314 U.S. 252, 261-63 (1941); *Dennis v. United States*, 341 U.S. 494, 526-27 (1951) (Frankfurter, J., concurring); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Texas v. Johnson*, 491 U.S. 397, 409 (1989). While communication with the predictable effect of advancing the unlawful ends of a violent terrorist organization may be suppressed because it poses a genuine threat of imminent and serious harm, communication seeking to learn and convey information about such a group, divert the group from violence, or mitigate human suffering in areas under the group's control cannot be suppressed because there is no causal nexus between such innocent speech and a sufficiently serious harm.

This Court has recognized an additional requirement under the First and Fifth Amendments when the government seeks to prosecute someone for speech or association with a group that engages in unlawful conduct: the person must have a specific intent to further the group's unlawful ends. *See Dennis*, 341 U.S. at 499-50; *Scales*, 367 U.S. at 221-24; *Elfbrandt v. Russell*, 384 U.S. 11, 15-16 (1966). This requirement of specific intent is particularly important where individuals seek to associate in some manner with groups (like those at issue in this case[7]) that engage in both lawful and unlawful activities:

> [Q]uasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause, as here construed . . . does not make criminal all association with an organization which has been shown to engage

---

[7] The PKK and LTTE engage in both lawful and unlawful pursuits. *See Humanitarian Law Project*, 552 F.3d at 921.

> in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent . . . .

Scales, 367 U.S. at 229-30 (emphasis in the original) (citation omitted).

The United States seeks to avoid full First Amendment review by mischaracterizing Respondents'/Cross-Petitioners' speech as a form of "conduct" subject to the less stringent standard of review used in *United States v. O'Brien*, 391 U.S. 367 (1968), to measure the constitutionality of draft card burning. The *O'Brien* test is triggered by prohibitions on non-speech behavior that incidentally affect expressive elements of the conduct. *See O'Brien*, 391 U.S. at 376-77. But the proposed communications of Respondents/Cross-Petitioners are pure speech. The government cannot transform them into conduct simply by labeling them "support" or "resources" and asserting that they will result in some concrete harm (here, aiding terrorist groups). The speech/conduct distinction does not turn on the effects of the communication.

Any other interpretation would threaten, not only the provision of human rights counseling that Respondents/Cross-Petitioners propose to undertake, but the academic freedom and freedom of the press upon which researchers and journalists in all areas of inquiry rely. If the provision of human rights counseling can be characterized as "conduct" based on its practical application, so, too, could academic research that motivates an economic competitor of the U.S. to change its policies, or investigative reporting that leads to a decline in the stock market.

In any event, the material support statute, as applied to the pure speech proposed by Respondents/Cross-Petitioners (and the speech in which *Amici* routinely engage), cannot satisfy even the diluted review standard in *O'Brien* because it does not further an "important or substantial governmental interest," and is far "greater than is essential to the furtherance of" any such interest. *O'Brien*, 391 U.S. at 377.

The government's only plausible interest in limiting speech with, or about, proscribed groups is to avoid advancing their lawless activities. The government contends that providing resources of any kind to terrorist groups—whatever the purpose—frees up other resources for them to pursue their illegal aims. But even if one were to accept that providing tangible property or money to proscribed groups for innocent purposes, like hospitals and orphanages, could free up property or money for illegal uses, that rationale does not carry over to pure speech. Unlike money or weapons, information is not fungible. Learning about non-violent alternatives does not enhance the ability to make bombs; nor does communication with a researcher or journalist who seeks to expand the store of public information about the group. The United States accordingly has not identified any plausible governmental interest, much less a compelling one, that would justify censoring innocent speech concerning, or with, a proscribed group.

III. THE COURT SHOULD READ THE MATERIAL SUPPORT STATUTE, WHEN APPLIED TO PURE SPEECH, TO REQUIRE BOTH A SPECIFIC INTENT TO FURTHER AN UNLAWFUL END AND A LIKELIHOOD OF HARM

If possible, a statute should be construed to avoid raising substantial constitutional issues. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). This canon of constitutional avoidance is often deployed to narrow statutes in tension with the First Amendment. *See, e.g., Edward J. DeBartolo v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). For example, in order to avoid serious First Amendment concerns, this Court construed a federal statute allowing customs agents to seize obscene materials to require "intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court," despite the fact that the statute itself contains no time limitations. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971). Judicial application of the avoidance canon respects Congress's equal commitment to constitutional values, *see Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *Public Citizen v. U.S. Dep't of*

Justice, 491 U.S. 440, 466 (1989), while leaving Congress the option to enact a broader statute subject to judicial review for constitutional soundness.

Application of the avoidance canon is particularly appropriate in this case. First, no doubt exists that the prospect of criminalizing Respondents'/Cross-Petitioners' proposed speech triggers the canon. Prior to the Court's decision in *United States v. Del. & Hudson Co.*, 213 U.S. 366, 407-08 (1909), the avoidance canon was applied only after a finding that a statute was, in fact, unconstitutional. In the modern era, however, the Court deploys the canon if the statute's application to proposed speech would raise a serious constitutional issue. *See* Adrian Vermeule, *Saving Constructions*, 85 Geo. L. J. 1945, 1949, 1958-59 (1997). As discussed in Parts I and II, *supra*, significant constitutional concerns would be raised if the statute's vague terms could be interpreted to apply to pure speech that is not intended or likely to further the unlawful aims of designated organizations.

Second, the statute is amenable to a narrowing construction, as demonstrated by this Court's rulings in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957). The statutory provision at issue in *Scales* made it a crime to become a member of any group that advocated violent overthrow of the U.S. government, "knowing the purposes thereof"—*i.e.*, knowing that the group espoused violent overthrow. 18 U.S.C. § 2385. The Court construed the statute to apply only to active members possessing a specific intent to further the organization's illegal aims. *See Scales*, 367 U.S. at 221-24. Although the Court did not specify the precise textual hook on which it hung this interpretation, later cases confirmed that the key to the Court's narrowing construction was the knowledge requirement. *See Aptheker v. Secretary of State*, 378 U.S. 500, 511 n.9 (1964); *United States v. Robel*, 389 U.S. 258, 262 (1967). Thus, even though the plain language of that provision required knowledge only of the organization's illegal aims, the Court construed the provision to require a specific intent to further those aims.[8]

The Ninth Circuit panel below deemed *Scales* distinguishable on the ground that "the statute in *Scales* . . . was silent with respect to requisite mens rea," while the material support statute "exposes one to criminal liability only where the government proves that the donor defendant acted with culpable intent—knowledge." *Humanitarian Law Project*, 552 F.3d at 926. In fact, the statute at issue in *Scales* not only contained a knowledge requirement; it contained a knowledge requirement very similar to the one in the material support statute, *i.e.*, knowledge of the organization's illegal aims or activities. The Court in *Scales* found that this knowledge requirement could—and must—be read to include a requirement of specific intent.

---

[8] The Court in *Scales* was not called upon to address whether membership could be criminalized absent any likelihood that such membership would lead to a sufficiently serious harm. *See Scales*, 367 U.S. at 230 n.21 ("As both sides appear to agree that the 'clear and present danger' doctrine . . . reaches the membership clause of the Smith Act, and since the petition for certiorari tenders no issue as to the method of applying it here, we do not consider either question.").

In addition to the specific intent requirement, a statute restricting protected speech must be construed, if possible, to apply only to speech that is likely to cause to a particularly serious harm, given that the statute otherwise would violate the First Amendment. *See* Part II, *supra*. In *Yates*, the Court considered a statutory provision making it a crime "to knowingly or willfully advocate . . . or teach" violent overthrow of the U.S. government. *Yates*, 354 U.S. at 301 n.1. The Court acknowledged that advocating merely the *idea* of forcible overthrow would satisfy the "ordinary dictionary definitions" of "advocate" and "teach." *Id.* at 319. It nonetheless held that such advocacy, even "if engaged in with the intent to accomplish overthrow," was "too remote from concrete action" to justify criminal sanction, *id.* at 321, and it refused to "assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Id.* at 319. The Court therefore construed the statute to apply only to "advocacy of action, not ideas," *id.* at 320, noting that such advocacy is not constitutionally protected when the audience is "of sufficient size and cohesiveness, is sufficiently oriented toward action, and other circumstances are such as reasonably to justify apprehension that action will occur." *Id.* at 321.

The material support statute similarly should be construed to apply to pure speech only where that speech is likely to produce the concrete harm that the statute is intended to prevent. The term "material support" itself is readily interpreted to incorporate such a limitation. In light of the clear purpose of the statute—*i.e.*, to "prevent and punish acts of terrorism," H.R. Rep. No. 104-518, at 1 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 944, 944—"material support" may fairly -be construed as support that is likely to enhance the designated organization's ability to engage in terrorist acts.[9]

These constructions are plausible readings, not only of the statutory language, but of congressional intent. In 2004, Congress added a provision to the material support statute limiting its scope to persons who act with "knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Although this provision does not expressly require specific intent to further the organizations' unlawful activities, Congress was presumptively aware that the Court in *Scales* construed a substantially equivalent provision to contain such a requirement. *See Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) ("[W]e presume legislatures act with case law in mind."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute."). Moreover, Congress at the same time added a provision prohibiting any construction or application of the statute that would abridge the exercise of First Amendment rights. *See* 18 U.S.C. § 2339B(i). It did so against the backdrop of the longstanding, well-settled case law cited in Part II, *supra*, establishing both the "specific intent" requirement and the requirement of a close causal connection between the restricted speech and a sufficiently serious harm.

---

[9] *Amici* do not argue that the Court must adopt such a narrowing interpretation in all applications of the statute. Rather, under the canon of constitutional avoidance, a narrowing construction need apply only in those contexts where it is necessary to avoid serious constitutional concerns.

CONCLUSION

Fifty years ago, confronted with a totalitarian communist threat to the very existence of our political and social order, this Court insisted on distinguishing innocent speech from speech with the purpose and effect of advancing imminent lawlessness and violence. *See, e.g., Elfbrandt*, 384 U.S. at 11; *Robel*, 389 U.S. at 264 ("For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties."). If we are to preserve scholarship and journalism of extraordinary value to all of us in our modern society, we can do no less today. Accordingly, *Amici* urge the Court to rule in favor of Respondents/Cross-Petitioners.

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
ELIZABETH GOITEIN
EMILY BERMAN
DAVID UDELL
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

SIDNEY S. ROSDEITCHER
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

November 23, 2009 Attorneys for *Amici Curiae*

AMICUS
CURIAE
BRIEF

No. 08-1498 & 09-89

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., Attorney General, *et al.*,
Petitioners and Cross-Respondents,
v.
HUMANITARIAN LAW PROJECT, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF JOHN D. ALTENBURG, Maj. Gen., US Army (Ret.), JAMES J. CAREY, Rear Adm., USN (Ret.), STEVEN B. KANTROWITZ, Rear Adm., USN (Ret.), THOMAS L. HEMINGWAY, Brig. Gen., USAF (Ret.), WASHINGTON LEGAL FOUNDATION, JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS, NATIONAL DEFENSE COMMITTEE, and ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: December 29, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

18 U.S.C. § 2339B(a)(1) makes it a crime to "knowingly provide[ ] material support or resources to a foreign terrorist organization." The term "material support or resources" is defined as meaning, *inter alia,* "any . . . service, including . . . training, . . . expert advice or assistance, [and] personnel." 18 U.S.C. § 2339A(b)(1). The petition and cross petition raise three distinct questions:

(1) Are the prohibitions of § 2339B(a)(1) unconstitutionally vague with respect to the provision of "service," "training," "expert advise or assistance," or "personnel?"

(2) Do the prohibitions of § 2339(B)(a)(1) violate the First Amendment as applied to the types of speech in which Respondents/Cross-Petitioners wish to engage?

(3) Is §2339B(a)(1) unconstitutionally overbroad, and thus facially invalid, with respect to the provision of "service," "training," "expert advice or assistance," or "personnel."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. SECTION 2339B DOES NOT PROHIBIT MANY OF THE ACTIVITIES IN WHICH RESPONDENTS SEEK TO ENGAGE 12

II. SECTION 2339B IS NOT VOID FOR VAGUENESS 19

  A. Section 2339B Provides People of Ordinary Intelligence a Reasonable Opportunity to Understand What Conduct Is Prohibited 19

  B. The Ninth Circuit Improperly Incorporated First Amendment Considerations Into Its Vagueness Analysis 25

III. SECTION 2339B DOES NOT VIOLATE THE FIRST AMENDMENT, WHETHER CHALLENGED FACIALLY UNDER OVERBREADTH ANALYSIS, OR AS APPLIED TO SPECIFIC TYPES OF ACTIVITIES THAT RESPONDENTS WISH TO UNDERTAKE 27

A. As Applied to Respondents' Proposed Expressive Activities, Section 2339B Does Not Violate the First Amendment 27

B. Section 2339B is Not Overbroad. . . . 32

IV. SECTION 2339B PLAYS AN IMPORTANT ROLE IN PROTECTING NATIONAL SECURITY 34

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

Cases:

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 28, 33

Buckley v. Valeo,
424 U.S. 1 (1976) 22

Colautti v. Franklin,
439 U.S. 379 (1979) 24

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 29

Grayned v. City of Rockford,
408 U.S. 104 (1972) 20

Hill v. Colorado,
530 U.S. 703 (2000) 19, 26

Humanitarian Law Project v. Reno,
9 F. Supp. 2d 1205 (C.D. Cal. 1998) 6

Humanitarian Law Project v. Reno,
205 F.3d 1130 (9th Cir. 2000) 24

Humanitarian Law Project v. U.S. Dep't of Justice,
393 F.3d 902 (9th Cir. 2004) (*en banc*) 27

Jarecki v. G.D. Searle & Co.,
367 U.S. 207 (1961) 14

Page(s)

Kolender v. Lawson,
461 U.S. 352 (1983) 26

Neder v. United States,
527 U.S. 1 (1999) 17

R.A.V. v. St. Paul,
505 U.S. 377 (1992) 28-29

Scales v. United States,
367 U.S. 203 (1961) 32

United States v. O'Brien,
391 U.S. 367 (1968) 11, 31

United States v. Raines,
362 U.S. 17 (1960) 20

United States v. Williams,
553 U.S. 285 (2008) 14, 25

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 20

Virginia v. Hicks,
539 U.S. 113 (2003) 33

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 20, 28

Page(s)

Statutes and Constitutional Provisions:

U.S. Const., amend i . . . . *passim*

U.S. Const., amend v 5, 36

8 U.S.C. § 1189(a)(1) 4, 18

18 U.S.C. § 3 29

18 U.S.C. § 1621 17

18 U.S.C. § 2252A(3)(B) 14

18 U.S.C. § 2339A 19, 35
18 U.S.C. § 2339A(b) 21
18 U.S.C. § 2339A(b)(1) . . . . *passim*
18 U.S.C. § 2339A(b)(2) 8, 13, 21
18 U.S.C. § 2339A(b)(3) 8, 13, 21

18 U.S.C. § 2339B . . . . *passim*
18 U.S.C. § 2339B(a)(1) . . . . *passim*
18 U.S.C. § 2339B(g)(4) 13
18 U.S.C. § 2339B(h) 13, 16, 17, 21

18 U.S.C. § 2252A(3)(B) 14

21 U.S.C. § 843(a)(4)(A) 17

26 U.S.C. § 6700(a)(2)(A) 17

Page(s)

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note* 24

Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 . . . . 6, 7

Miscellaneous:

Department of State, Office of the Coordinator for Counterterrorism, *Country Report on Terrorism 2008*, Chapter 6, "Terrorist Organizations," available at http://www.state.gov/s/ct/rls/crt/2008/122449.htm (last visited December 24, 2009) 34

Testimony of Deputy Ass't Attorney General Gregory Katsas, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (May 10, 2005) 35

Webster's New Collegiate Dictionary (1981) 16

153 Cong. Rec. S15876 (2007) (Statement of Senator Kyle) 35

www.krg.org 30

INTERESTS OF *AMICI CURIAE*

Amici curiae are four individuals who are retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Major General John Altenburg, U.S. Army (Ret.), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from March 2004 to November 2006.

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the election of more veterans to the U.S. Congress.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the U.S. Navy from September 1974 through January 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the Judge Advocate General of the Navy. At the time of his selection to flag rank, he served as commanding officer of an international and operational law unit. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He was also an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004). WLF also filed a brief in this matter when it was before the court of appeals.

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan educational organization committed to explaining the need for a prudent national security policy for the United States, addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that the Ninth Circuit's decision, if allowed to stand, could significantly impair the federal government's ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted legislation designed to cut off such support. *Amici* believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support for such groups, regardless of the form in which that support is given. *Amici* further believe that Congress has spoken with sufficient clarity to make clear to a person of ordinary intelligence the scope of the prohibition: Congress has prohibited virtually all support for foreign terrorist groups, provided that the support is "material" and is given directly "to" the groups.

STATEMENT OF THE CASE

Congress has authorized the Secretary of State to designate an organization as a "foreign terrorist organization" (FTO) if, *inter alia*, the organization engages in terrorist activity and that activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). If an organization has been so designated, it is a serious criminal offense to "knowingly provide material support or resources" to the organization. 18 U.S.C. § 2339B(a)(1).

Among the organizations that the Secretary of State has designated as FTOs are the Kurdistan Workers Party ("Partiya Karkeran Kurdistan" or "PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Despite that designation, Respondents/ Cross-Petitioners (six organizations and two U.S. citizens) seek to provide material support to those terrorist groups. Respondents contend that they do not seek to support PKK's and LTTE's terrorist activities;

rather, they assert a desire to provide material support for the groups' lawful humanitarian and political activities. They filed two suits in U.S. District Court for the Central District of California, seeking to enjoin the federal government from initiating criminal proceedings against them for providing such support. The suits alleged, *inter alia*, that several of the statutory terms used to define what constitutes the provision of "material support or resources" – including "training," "expert advice or assistance," "service," and "personnel" – were impermissibly vague, in violation of the Fifth Amendment, because they fail to provide people of ordinary intelligence with a clear understanding of what activities are impermissible. The suits also alleged that those same statutory terms violated their First Amendment rights.

Before this Court, Respondents challenge § 2339B only with respect to a very limited set of activities: they seek to speak with the leadership of PKK and LTTE, principally for the purpose of providing advice regarding how to facilitate a peaceful settlement of their political disputes and how to seek redress for human rights violations.

In the lower courts, however, Respondents' challenge was far broader. Respondents Humanitarian Law Project (HLP), Ralph Fertig, and other individuals associated with HLP (the "HLP Respondents") sought the right to: (1) solicit and contribute funds for PKK's "political work" on behalf of Kurds' human rights and its humanitarian assistance to Kurdish refugees; (2) advocate on PKK's behalf before the UN Commission on Human Rights and the U.S. Congress; (3) write and distribute publications supportive of PKK and the cause of Kurdish liberation; (4) advocate for the freedom of Turkish political prisoners convicted of being PKK members or supporters; and (5) provide lodging to PKK members while they attend peace conferences and similar meetings. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1209 (C.D. Cal. 1998). The remaining Respondents (four organizations and two individuals, collectively, "the Sangram Respondents") sought the right to: (1) donate food and clothing to a branch of LTTE engaged in economic development activities; (2) donate school supplies and other educational materials to a branch of LTTE engaged in education; (3) donate money to fund LTTE's non-violent activities, particularly orphanages operated by LTTE; (4) distribute LTTE literature here in the United States; and (5) donate money to LTTE to be used to provide humanitarian assistance to Tamils living in Sri Lanka. *Id.* at 1209-1211.[2] None of the Sangram Respondents complained that federal law was preventing them from engaging in any "pure speech."

As set forth in detail in the Brief of the United States, the cases have a lengthy procedural history – including three separate appeals to the Ninth Circuit. In December 2004, Congress adopted the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638, which amended several of the statutory provisions challenged by Respondents. Following adoption of IRTPA, the appeals court vacated an earlier injunction issued by the district court against enforcement of portions of 18 U.S.C. § 2339B, and remanded the cases to the district court for reconsideration in light of the IRTPA amendments.

---

[2] Following the December 2004 tsunami that devastated Sri Lanka, the Sangram Respondents expressed particular interest in providing funds to LTTE so that LTTE could provide aid to Tamil tsunami victims.

On remand, the district court consolidated the two cases and largely duplicated its prior rulings. Pet. App. 33a-76a. It held that three of four challenged statutory terms were impermissibly vague: "training," "expert advice or assistance," and "service."[3] It held that the 2004 IRTPA amendments failed to cure the vagueness concerns expressed by the court in prior decisions with respect to the first two terms, and that "service," a term added for the first time by IRTPA, suffered from similar vagueness problems. *Id.* at 60a-68a. It enjoined the United States from prosecuting Respondents under § 2339B based on any one of those three terms.

The district court denied a vagueness challenge to a fourth statutory term: "personnel." It held that IRTPA had cured the previously identified deficiencies in the definition of "personnel" by providing "fair notice" of the prohibited conduct. *Id.* at 69a. The district court also rejected all First Amendment claims.

The Ninth Circuit affirmed. *Id.* at 1a-32a. It held that the term "training" (defined under IRTPA as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. § 2339A(b)(2)) was impermissibly vague because a person of ordinary intelligence would not know whether the conduct contemplated by Respondents constituted "training" and thus the unlawful provision of "material support." *Id.* at 21a-23a.[4] The court also held that even if a person of ordinary intelligence could differentiate between instruction that imparts a "specific skill" and instruction that imparts "general knowledge," it would still be unconstitutionally vague because, as so defined, "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a.

---

[3] The challenged terms are among a laundry list of items included within the definition of "material support or resources," 18 U.S.C. § 2339A(b)(1), the provision of which to an FTO is prohibited by 18 U.S.C. § 2339B(a)(1).

The appeals court held that the term "expert advice or assistance" (defined under IRTPA as advice or assistance derived from "scientific, technical, or other specialized knowledge," 18 U.S.C. § 2339A(b)(3)) was impermissibly vague, at least with respect to the "other specialized knowledge" portion of the ban. *Id.* at 24a. The court held that that portion of the ban was void for vagueness because it: (1) was not "reasonably understandable to a person of ordinary intelligence"; and (2) "continue[d] to cover constitutionally protected advocacy." *Id.*

---

[4] The court held that a person of ordinary intelligence would not know whether the following contemplated conduct was prohibited: "teaching someone to petition international bodies for tsunami related aid" and "instruct[ing] members of a designated group on how to petition the United Nations to give aid to their group." *Id.* at 21a-22a.

The appeals court also held that the term "service" encompassed both "training" and "expert advice or assistance" and thus was constitutionally flawed for the same reasons that those other terms were flawed: a person of ordinary intelligence would not know whether his contemplated conduct constituted "service," and "'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'" *Id.* at 25a (quoting district court decision, *id.* at 67a).

The appeals court affirmed the district court's rejection of Respondents' void-for-vagueness challenge to the term "personnel." *Id.* at 26a-27a. The court also affirmed the district court's rejection of Respondents' First Amendment overbreadth challenge to the terms "training," "expert advice and assistance," "service," and "personnel." The court stated that while Respondents "may be able to identify particular instances of protected speech that may fall within the statute," those instances "are not substantial" when compared to the many legitimate applications of § 2339B. *Id.* at 29a.

The Court granted a petition for review filed by Petitioners (the "United States") and a cross-petition filed by Respondents. In their cross-petition, Respondents make clear that they have abandoned their claim that the First Amendment protects their right to engage in expressive conduct (*e.g.*, the contribution of cash and supplies to FTOs); their claim before the Court relates solely to an alleged right to engage in "pure speech" (*i.e.*, communication expressed solely through oral or written words) in support of FTOs.

SUMMARY OF ARGUMENT

In challenging § 2339B on vagueness and First Amendment grounds, Respondents supply a laundry list of expressive activities that they assert are barred, or could reasonably be understood as barred, by the statute. In fact, the statute's application to expressive activities is far more limited than Respondents suggest. In general, activities are barred by the statute if and only if: (1) they involve direct interaction with an FTO (as opposed to independent activities designed to support the FTO or its goals); (2) they benefit the FTO in some way; and (3) the benefit provided is "material" (*i.e.*, significant). Those guidelines are sufficient to provide people of ordinary intelligence a reasonable opportunity to understand what activities are prohibited, and thus the statute is not void for vagueness.

The Ninth Circuit's vagueness analysis went awry because it focused on the wrong portion of the statute. The issue before the Court is whether § 2339B(a)(1) is overly vague. But instead of focusing on the language contained in § 2339B(a)(1) (the prohibition against knowingly providing "material support or resources" to an FTO), the appeals court focused on the extensive statutory definitions that attempt to provide guidance regarding the meaning of "material support or resources." It construed those definitions as though they imposed 15 or more separate prohibitions and then faulted Congress for failing to provide an adequate definition for each of those separate offenses. The more appropriate statutory construction method is to consider the statute as a whole and to assume (applying the *noscitur a sociis* canon) that the definitional terms have a common purpose and are given meaning by the neighboring words of the statute. When that approach is adopted, any apparent vagueness in § 2339B readily disappears.

Nor does § 2339B violate Respondents' First Amendment rights. The statute is content-neutral – Congress's only purpose in adopting the statute was to stop material aid from reaching FTOs, and it did not care what message Respondents and others wished to convey. Respondents' proposed actions do not warrant strict First Amendment protection simply because their proposed conduct (the provision of material support to terrorist groups) is to be carried out by means of spoken or written words. The Court has long recognized that the First Amendment does not protect those who use words to carry out a criminal enterprise.

Because § 2339B is content-neutral, any incidental restrictive effects that it has on speech are to be judged under the intermediate standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The statute easily passes that test; in particular, the United States has demonstrated that those incidental speech restrictions are no greater than necessary to maintain national security.

Both Congress and the Executive Branch have determined that § 2339B plays a critical role in protecting the Nation from terrorism. *Amici*, several of whom have first-hand knowledge of the grave threat to national security posed by foreign terrorist organizations, urge the Court not to second-guess that determination.

ARGUMENT

I. SECTION 2339B DOES NOT PROHIBIT MANY OF THE ACTIVITIES IN WHICH RESPONDENTS SEEK TO ENGAGE

In challenging § 2339B on vagueness and First Amendment grounds, Respondents supply a laundry list of expressive activities that they assert are barred, or could reasonably be understood as barred, by the statute. Before addressing Respondents' constitutional claims, *amici* wish to focus on the precise language of § 2339B. The statutory language makes clear that while Congress intended to broadly prohibit Americans from aiding FTOs, many of the expressive activities listed by Respondents are not subject to the prohibition.

Section 2339B(a)(1) makes it unlawful to "knowingly provide[ ] material support or resources to a foreign terrorist organization" or to "attempt[ ] or conspire[ ] to do so." "Material support or resources" means:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

§ 2339B(g)(4) (incorporating definition from 18 U.S.C. § 2339A(b)(1)). The term "training" is further defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. § 2339A(b)(2), while "expert advice or assistance" is further defined to mean "advice or assistance derived from scientific, technical, or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). The statute also imposes limitations on the meaning of the term "personnel," including a provision stating that an individual shall not be considered to be working under an FTO's "direction and control" (and thus not considered to be providing "personnel" to the FTO) if he acts "entirely independently" of the FTO "to advance its goals and objectives." 18 U.S.C. § 2339B(h).

In attempting to convey what it meant by "material support or resources," Congress was extraordinarily detailed: it used more than 15 separate terms in explaining its intent. But the Ninth Circuit did not applaud the provision of a lengthy definition as a salutary effort to avoid confusion. Rather, it construed the definition of "material support or resources" as though it imposed 15 or more separate prohibitions, and then faulted Congress for failing to provide an adequate definition for each of those separate prohibitions. Pet. App. 19a-27a.

By construing the definitional section as though it multiplied the number of statutory prohibitions 15 fold, the Ninth Circuit failed to abide by a fundamental canon of statutory construction: *noscitur a sociis*, which counsels that a word is given more precise content by the neighboring words with which it is associated. *See*

Jarecki v. G.D. Searle & Co., 367 U.S. 207 (1961). Thus, for example, if a court determines that Congress intended that an activity would not constitute the provision of "training" as defined by § 2339A(b)(1), *noscitur a sociis* would make that determination relevant in deciding whether the same activity constitutes "expert advice or assistance." But the Ninth Circuit set about determining the meaning of each term used in § 2339A(b)(1) without any reference to the meaning of its neighboring words.

Respondents assert that this *seriatim* approach to statutory construction is appropriate because § 2339A(b)(1) uses the conjunction "or" in setting forth the definition of "material support or resources" – *e.g.*, an activity can constitute "material support or resources" if it is *either* "financial support" *or* "transportation." But this Court has routinely applied *noscitur a sociis* to statutory words appearing in a series even though they are connected by the word "or." Thus, when considering a vagueness challenge to 18 U.S.C. § 2252A(a)(3)(B) – which *inter alia* prohibits "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" child pornography – the Court recently applied *noscitur a sociis* in determining the intended meaning of the five listed verbs, notwithstanding that the verbs are connected with the conjunction "or." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1839 (2008). The Court explained that while the verbs "promotes" and "presents," when considered in isolation, "are susceptible of multiple and wide-ranging meanings," "commonsense" requires that they be afforded "narrowed" meanings in light of their use in association with the more limited verbs "advertises," "promotes," and "solicits." *Id.* The Court reasoned that the five verbs, when considered collectively, indicate that Congress sought to criminalize only those activities with a "transactional connotation." *Id.*

This canon of statutory construction is particularly pertinent to § 2339A(b)(1)'s use of the word "service." When used in isolation, the word "service" can be interpreted to encompass virtually any activity that might benefit another. But the numerous other words employed by Congress in defining "material support or resources" makes plain Congress's intention that "service" be understood as encompassing only those services that are similar in nature to the specific services enumerated in § 2339A(b)(1). The use of the word "including" following the word "service" is particularly significant; it indicates that the terms that follow are examples of the types of service (as well as tangible or intangible property) that meet the statutory definition.

The history surrounding the 2004 amendment that added the word "service" supports that understanding. Before 2004, § 2339A(b)(1) began with the phrase, "currency or monetary instruments." As part of the IRTPA amendments in 2004, Congress added the phrase, ". . . any property, tangible or intangible, or service, including . . ." immediately preceding "currency or monetary instruments." The reason for the amendment seems relatively clear: Congress was not intending thereby to expand the definition of "material support or resources" but rather to state explicitly what was already implicit in the statute: an action could satisfy the statutory definition regardless of the form it took (*i.e.*, regardless whether the action provided tangible property, intangible property, or a service).

The *noscitur a sociis* canon also strongly supports the federal government's view that Congress did not intend § 2339B to bar actions taken "entirely independently" of an FTO, even when the actions are intended to "advance its goals or objectives." The quoted language comes from § 2339B(h), which was added to the statute in 2004 by IRTPA. While by its terms, § 2339B(h) defines what it means to provide "personnel" to an FTO, there is every reason to believe that Congress intended the definition to apply not just to "personnel" but across the board to all the terms set forth in § 2339A(b)(1). It would not make sense for Congress to have gone out of its way to explain that one who acts "entirely independently" of an FTO to advance the FTO's objectives cannot be charged with having provided "personnel" to the FTO, yet at the same time to have permitted that same person to be charged with having provided another one of the enumerated forms of "material support." Rather, *noscitur a sociis* suggests that Congress intended the terms set forth in § 2339A(b)(1) to be read similarly, such that "entirely independent" actions that are immunized from a "personnel" prosecution by § 2339B(h) would also be immunized from a "service" or an "expert advice or assistance" prosecution.

Section 2339B(a)(1) includes several other provisions that significantly limit its reach. For example, provision of "support or resources" is not prohibited unless it is "material," an adjective meaning "having real importance or great significance." *See Webster's New Collegiate Dictionary* (1981). Thus, activities are not criminalized simply because they arguably provide a small degree of support to an FTO.[5] The statutory prohibition is limited to material support or resources that are provided "to" an FTO, thereby limiting the statute to situations in which there is some sort of direct interaction between the defendant and the FTO.[6] Moreover, the statute is inapplicable unless the defendant has acted "knowingly" *and* knows that the benefitted organization has been designated an FTO by the State Department.

With these limitations in mind, it is readily apparent that many of the hypothetical situations envisioned by Respondents do not constitute statutory violations. For example, the HLP Respondents wish to "advocate on behalf of the Kurdish people and the PKK before the United Nations and the United States Congress." Respondents Br. 10-11. Section 2339B imposes no limitations whatsoever on advocacy "on behalf of the Kurdish people," and advocacy on behalf of PKK is prohibited only to the extent that one acts under the "direction or control" of PKK. The Sangram Respondents are similarly free to "engage in political advocacy on behalf of Tamils living in Sri Lanka." *Id.* Permissible advocacy would include filing an *amicus curiae* brief in support of the FTO in a judicial proceeding, provided only that the brief is not filed under an FTO's direction or control.[7] Nor does the statute prohibit "independent" statements that one supports the cause of an FTO, deems oneself a member of the FTO, or otherwise wishes to be associated with the group.

---

[5] Federal statutory law regularly uses the word "material" in this "great significance" sense. *See, e.g.*, 18 U.S.C. § 1621 (criminalizing perjury where the defendant has made statements under oath "regarding any material matter which he does not believe to be true"); 21 U.S.C. § 843(a)(4)(A) (prohibiting the furnishing of "false or fraudulent material information" in documents required under federal drug law); 26 U.S.C. § 6700(a)(2)(A) (criminalizing the making of a statement regarding a tax deduction or credit that is "false or fraudulent as to any material matter"). The Court has explained that inclusion of the word "material" is understood to "limit" the scope of the statute. *Neder v. United States*, 527 U.S. 1, 23 (1999).

[6] In this sense, use of the word "to" serves a function similar to § 2339B(h)'s exemption for "personnel" activity taken "entirely independently" of the benefitted FTO.

Nor is there any basis for Respondents' assertions that § 2339B prohibits all dialogue with the leadership of an FTO. *Id.* at 46, 70. The statute prohibits actions that materially benefit an FTO; merely speaking with an FTO's leadership (and, for example, seeking to fact-check an anticipated human rights complaint, or urging the group to eschew violence and to seek peaceful resolution of its grievances) does not violate the statute because it cannot reasonably be understood as providing *material* support *to* the FTO.

---

[7] Representing an FTO in court proceedings raises a closer question. The most reasonable interpretation is that Congress intended to permit attorneys to represent an FTO in a lawsuit challenging the State Department's decision to list the group as an FTO, given that Congress expressly authorized such lawsuits. *See* 8 U.S.C. § 1189(b)(1). Also, given that the U.S. Constitution protects the right to counsel in a criminal proceeding and that defense attorneys are viewed as officers of the court, it is fair to conclude that Congress did not intend to prohibit attorneys from defending an FTO or the leadership of an FTO in a criminal case.

Amici do not mean to diminish the broad scope of the prohibitions imposed by § 2339B. *Amici* share Congress's desire to diminish the threat created by terrorist groups by preventing those groups from looking to Americans for substantial assistance. But when addressing Respondents' constitutional claims, it is important to bear in mind the limitations that Congress has placed on the "material support" bar.

II. SECTION 2339B IS NOT VOID FOR VAGUENESS

A. Section 2339B Provides People of Ordinary Intelligence a Reasonable Opportunity to Understand What Conduct Is Prohibited

A statute is impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado,* 530 U.S. 703, 732 (2000).[8] Courts have stressed that because no set of words will convey precisely the same meaning to all people, all that is required to survive a vagueness challenge is that "it is clear what the ordinance *as a whole* prohibits."

---

[8] A statute can also be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* However, this second prong of vagueness analysis is not at issue here. Respondents point to nothing in the language of §§ 2339A and 2339B that encourages arbitrary and discriminatory enforcement, and do not assert that the federal government has a history of enforcing the statute in an arbitrary or discriminatory manner. Indeed, Respondents' pre-enforcement challenge does not point to *any* history of enforcement of the ban.

Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (emphasis added). Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.*

The Court has noted that where, as here, some portion of the conduct prohibited by the statute has an expressive component and thus implicates First Amendment values, the courts should apply a somewhat more stringent vagueness test. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Moreover, the Court has been very reluctant to entertain facial vagueness challenges based on factual settings not presented by the case at issue: "speculation about possible vagueness in hypothetical situations not before the court will not support a facial attack on a statute when it is surely valid 'in the vast majority of intended applications.'" *Hill*, 530 U.S. at 733 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

In addressing Respondents' void-for-vagueness claim, the Ninth Circuit failed to focus on what § 2339B "as a whole" prohibits and instead focused on individual terms adopted by Congress as part of its effort to explain what constitutes "material support or resources." Indeed, while enjoining enforcement (with respect to Respondents) of three of the terms used in § 2339A(b)(1) to define "material support or resources," the Ninth Circuit simply failed to address whether § 2339B itself provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

The language employed by Congress in prohibiting significant direct support for designated "foreign terrorist groups," when taken as a whole, easily meets the vagueness test described above. Section 2339B(a)(1) prohibits "knowingly" providing "material support or resources" to an FTO. It provides a detailed definition of the term "material support or resources." 18 U.S.C. § 2339A(b)(1). It elaborates on that definition by further explaining the meaning of three of the terms used in § 2339A(b)(1): "training" (§ 2339A(b)(2)), "expert advice or assistance" (§ 2339A(b)(3)), and "personnel" (§ 2339B(h). While one cannot glean from the statute "with mathematical certainty" what activities are prohibited, a person of ordinary intelligence should be able to discern whether this extraordinarily detailed statute covers an activity in which he proposes to engage. In general, activities are covered if and only if: (1) they involve direct interaction with an FTO (as opposed to independent activities designed to support the FTO or its goals); (2) they benefit the FTO in some way; and (3) the benefit provided is significant.[9] If those criteria are met, an activity is prohibited regardless whether the activity has an expressive component; § 2339B makes no distinction between activities with an expressive component and those that lack such a component.[10] The statute contains only two exceptions: the supply of "medicine or religious materials" is not prohibited.

---

[9] Thus the distinction (set forth in § 2339A(b)) between advice derived from general knowledge (permissible) and advice derived from scientific, technical, or other specialized knowledge (not permissible). Congress sought thereby to provide a clearer explanation regarding what constitutes "material" support. The more specialized the knowledge imparted to an FTO, the more likely it is to be deemed "material."

The analytical approach adopted by the Ninth Circuit – lengthy, discrete discussions of what is covered by each of the terms "service," "training," "expert advice or assistance," and "personnel" – is largely beside the point because the *only* activity prohibited by § 2339B is the provision of "material support or resources" to an FTO. So long as the meaning of that latter phrase is reasonably clear, it is less relevant whether (for example) "training" covers more activities or fewer activities than "expert advice or assistance."[11]

Some of the "expressive" activities in which Respondents wish to engage clearly constitute "material support or resources" while others clearly do not. For example, the Sangram Respondents express a desire to provide expert advice and training in Tamil language, literature, arts, cultural heritage, and history. Nothing in § 2339B prevents them from doing so, even if some of those receiving the training happen also to be members of LTTE. Such expert advice and training could not reasonably be deemed to have been provided "to" LTTE unless the training sessions at issue were being run under the auspices of LTTE, or LTTE had arranged for such sessions in order to gain knowledge that would further the goals of LTTE. Thus, those wishing to impart their knowledge to the Tamil of Sri Lanka (including knowledge regarding international law, tsunami relief, or gaining United Nations support for the Tamil cause) have an easy way of doing so without running afoul of § 2339B: just make sure that one's actions are not being undertaken under the auspices of LTTE.

---

[10] *Amici* note that many activities involving the provision of material support to an FTO contain at least some expressive component. For example, donating goods or services to another generally is deemed an expression of support for the recipient. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).

[11] The Ninth Circuit faulted Congress because "[t]here is no statutory definition of the word 'service.'" Pet. App. 25a. But given that the statute simply uses "service" to help define the prohibited activity, the appeals court's approach to void-for-vagueness analysis cannot be correct. One can always dig far enough back into the statutory definitions to find a word that has not itself been defined. *See also* the discussion of "service" *supra* at 15 (the word "service" is not on a par with other terms included in § 2339A(b)(1) but rather is used generically, with the terms that follow explaining the types of "services" that can qualify as "material support or resources").

On the other hand, one of the activities proposed by the HLP Respondents clearly is covered by § 2339B: they wish to provide PKK leaders with expert training regarding how best to press PKK's political agenda, including expert training regarding how to approach international bodies for the purpose of negotiating a peace treaty with the government of Turkey. Assuming that PKK is really interested in receiving such expert advice from Fertig and the other HLP Respondents and assuming that the expert advice has value to PKK, then the proposed activity quite clearly is prohibited by the statute. There can be little question that Fertig's knowledge of international law and negotiating strategies qualifies as "expert advice or assistance"; the HLP proposes giving the advice directly "to" PKK leaders; and, assuming they value the advice, the assistance to be provided is "material." For purposes of the void-for-vagueness analysis, it is irrelevant that the proposed expert advice does not directly further any terrorist activity; Congress has unequivocally determined that international terrorism "threatens the vital interests of the United States" and that any material support provided to terrorist groups facilitates that terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. Accordingly, Congress has determined that national security requires that *all* direct material support to groups determined by the federal government to be FTOs should be prohibited. *Id.* Congress determined that such donations of goods or services – even donations intended to further the FTOs non-terrorist activities – should be prohibited because donated resources used to cover the costs of non-terrorist activities free up other resources and thereby permit the organization to divert those other resources to terrorism. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000).

Section 2339B's scienter requirement (limiting the statute's reach to those who "knowingly" provide material support to others they know to be terrorist groups or to have been designated as such by the State Department) eliminates whatever vagueness problems might otherwise exist, by assuring that the statute will not be applied to those who fail to understand its reach. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (the constitutionality of an allegedly vague statute "is closely related to whether that standard incorporates a requirement of mens rea"). Of course, Respondents are well aware that PKK and LTTE are designated as FTOs and that § 2339B prohibits providing material support to those groups. Accordingly, there is little reason to be sympathetic to their claims that there may be some hypothetical situations to which § 2339B's application may be unclear.[12] The statute is broad, and its application (or non-application) to the support they wish to provide is clear.

B. The Ninth Circuit Improperly Incorporated First Amendment Considerations Into Its Vagueness Analysis

The Ninth Circuit's error extended beyond its misguided one-by-one examination of the various terms used to define "material support or resources." The appeals court's decision to strike down three of those terms was based on a misunderstanding of the vagueness doctrine.

The court held that even if a person of ordinary intelligence would understand what activities are prohibited by the challenged language of § 2339A(b)(1), that language is void for vagueness if the prohibited activities could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. The appeals court then proceeded to invoke this could-be-read-to-encompass-speech-and-advocacy doctrine as a basis for declaring "training," "other specialized knowledge," and "service" impermissibly vague. *Id.* at 22a, 24a, 25a.

---

[12] The vagueness analysis does not change simply because there may be some hypothetical situations in which it is unclear whether the support provided is sufficiently "material" or the knowledge imparted is sufficiently "specialized." The mere fact that close cases can be envisioned does not render a statute vague. "The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 128 S. Ct. at 1846.

That holding directly conflicts with numerous decisions of this Court, which hold that a statute is impermissibly vague (thereby violating due process rights) only if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) defines a criminal offense with insufficient definiteness such that it encourages arbitrary and discriminatory enforcement. *See, e.g., Hill v. Colorado,* 530 U.S. 703, 732 (2000); *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

The Ninth Circuit's approach is not a vagueness analysis at all, but rather is a disguised First Amendment analysis. One properly begins a vagueness analysis by determining whether a challenged statute fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. If the statute provides such an opportunity, it is not impermissibly vague, regardless whether it arguably infringes on free speech rights. Any such argument should be determined based on a First Amendment analysis, not on a vagueness analysis.

III. SECTION 2339B DOES NOT VIOLATE THE FIRST AMENDMENT, WHETHER CHALLENGED FACIALLY UNDER OVERBREADTH ANALYSIS, OR AS APPLIED TO SPECIFIC TYPES OF ACTIVITIES THAT RESPONDENTS WISH TO UNDERTAKE

The Ninth Circuit rejected Respondents' First Amendment challenge to § 2339B. The court held that their overbreadth challenge failed because the statute "is not aimed at interfering with the expressive component of [Respondents'] conduct but at stopping aid to terrorist groups," and because any instances of protected speech that may fall within the statute "are not substantial when compared to [its] legitimate applications." Pet. App. 28a-29a. The appeals court rejected Respondents' as-applied First Amendment challenge in a prior, *en banc* decision. *Humanitarian Law Project v. U.S. Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (*en banc*).

A. As Applied to Respondents' Proposed Expressive Activities, § 2339B Does Not Violate the First Amendment

The appeals court's conclusion that § 2399B is content-neutral is correct. Respondents have presented no evidence suggesting that, in adopting the statute, Congress had any purpose in mind other than a desire to stop material aid to terrorist groups. Congress did not care what message Americans might wish to convey to FTOs; its sole desire was to prevent Americans from providing services/property that are of value to an FTO and that thus facilitate the FTO's operations (including, either directly or indirectly, its terrorist operations).

Respondents' efforts to distinguish between expressive conduct and "pure speech" (*i.e.*, expression that takes the form of written or spoken words) are largely unavailing. Courts are somewhat more skeptical of government regulation of "pure speech" than of expressive conduct, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), perhaps because they are more likely to suspect that regulation of "pure speech" is based on the content of what is being expressed. But where, as here, the evidence is unequivocal that the government's regulation of written/spoken words is unrelated to the thoughts being expressed, the distinction between regulation of expressive conduct and "pure speech" falls away.[13]

---

[13] It is true that the statute distinguishes speech based on the degree to which the speech assists an FTO – speech is prohibited only if it provides "material" support to an FTO. But that type of distinction should no more be deemed "content-based" than is a regulation that regulates outdoor music based on its volume. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The material/non-material distinction is based on Congress's appraisal of the likelihood that the speech will facilitate terrorism, not on the ideas being expressed. As the Court has explained:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech is itself proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only obscenity which is the most patently offensive *in its prurience* – *i.e.*, that which involves the most lascivious displays of sexual

Respondents are mistaken in their assertion that the First Amendment requires strict scrutiny of government regulation of activities that take the form of written/spoken words. As Justice Black, never known to be shy in espousing broad First Amendment protections, wrote 60 years ago in rejecting a First Amendment challenge to an injunction forbidding union picketing:

> It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

The federal government regularly charges individuals with being accessories after the fact, in violation of 18 U.S.C. § 3, for providing advice to fleeing felons regarding how to evade capture. Such advice is no more inherently blameworthy than providing human rights training to the avowed enemies of the United States; in each instance, the speech, while innocuous in itself, thwarts government efforts to subdue criminals. Respondents are free to teach courses, open to the public, designed to assist students in negotiating peace

---

> activity.

R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992).

treaties. *See,, e.g.*, Respondents Br. at 23. But they are not free to supply that expertise for the especial benefit of an FTO.[14] Thus, if Dr. Samuel Mudd wants to teach a course entitled, "Little Known Routes One Can Use to Leave Maryland and Cross the Potomac River Without Being Detected," the First Amendment protects his right to do so. But the First Amendment does not protect his right to supply that information privately to John Wilkes Booth, assuming that he knows Booth's status as a fleeing felon.

In support of their claim that § 2339B is not content-neutral, Respondents assert that the statute permits speech critical of an FTO but not speech "for the benefit of" an FTO. *Id.* at 20. That assertion is based on a false dichotomy. Americans are just as free to praise an FTO as they are to criticize it. All they are prohibited from doing is taking actions (including actions expressed through words) that involve direct interaction with a known terrorist group and that provide "material support" to the group. Respondents insist that their speech will not facilitate PKK's and LTTE's terrorism, but that assertion is contradicted by Congress's factual findings. If Respondents wish to challenge Congress's determination, they should take their case to the current Congress, not the courts.

---

[14] There is no merit to Respondents' assertion that they are unable to impart valuable information to Kurds and Tamils without working through PKK and LTTE. LTTE controls no territory within Sri Lanka at this time. PKK operates mainly out of northern Iraq. That portion of Iraq is largely autonomous and is governed by the democratically elected Kurdistan Regional Government (KRG), which has expressed considerable interest in assisting Kurds living in neighboring Turkey. *See* www.krg.org. Thus, to the extent that the HLP Respondents wish to assist Kurds living in Turkey, they can impart their specialized skills to the KRG.

Because § 2339B's regulation of expressive activities is content-neutral, such regulation is subject to intermediate First Amendment scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968). Under that standard, government regulation not intended to suppress disfavored speech but which nonetheless incidentally affects speech will be sustained:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The statute easily passes that test. The federal government has determined that PKK and LTTE engage in terrorism and that any "material" support provided to those groups will assist them in carrying out further terrorism. The government undoubtedly has a substantial interest in suppressing terrorism. Moreover, § 2339B is narrowly drawn to ensure that it does not unnecessarily interfere with speech. For example, it does not prohibit anyone from speaking out in favor of an FTO or its terrorist goals and does not prohibit anyone from becoming a member of an FTO or otherwise associating himself with the group.

Respondents' reliance on *Scales v. United States*, 367 U.S. 203 (1961), is misplaced. *Scales* held that the Smith Act did not criminalize mere membership in the Communist Party; it stated that any such interpretation would raise serious First Amendment concerns because it would interfere with associational rights. *Id.* at 224-25. No similar concerns are implicated here because § 2339B does not criminalize membership in or association with an FTO, but rather applies only to those who supply "material support" with full knowledge that the organization has been designated as an FTO.

If the Court nonetheless determines that application of § 2339B to any of Respondents' proposed activities would violate the First Amendment, an injunction should do no more than enjoin the government from enforcing the statute with respect to those activities. In the absence of an overbreadth finding, it would be inappropriate to prohibit the government from enforcing the statute (or any of its definitional terms) with respect to any other activities in which Respondents may wish to engage.

B. Section 2339B is Not Overbroad

The Ninth Circuit correctly rejected Respondents' overbreadth claim. In the absence of persuasive evidence from Respondents that § 2339B proscribes a substantial amount of speech activity in violation of the First Amendment, invocation of the overbreadth doctrine to permit a facial challenge to the statute is wholly inappropriate. As the Supreme Court has explained, although overbreadth adjudication serves an important function of ensuring that overbroad laws are not permitted to "chill" constitutionally protected speech by those unwilling to risk prosecution under the law:

> There are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003) (quoting *Broadrick*, 413 U.S. at 615, 613 (1973)). Striking down the challenged statutory provisions on overbreadth grounds would have enormous negative impact on national security: it would deprive the federal government of the authority, for example, to criminally prosecute those who provide "expert advice or assistance" to terrorist groups by teaching them how to build bombs. *Amici* do not understand Respondents to argue that such expert advice or assistance is entitled to any constitutional protection; yet the result of the relief they seek would be to provide legal protection to such individuals.

Respondents have essentially conceded that § 2339B is not substantially overbroad by abandoning the great majority of the claims (described above) that they initially pressed in the district court. For example, the Ninth Circuit rejected Respondents' claim that they have a First Amendment right to donate money and supplies to FTOs, and Respondents do not challenge that holding. The primary focus of § 2339B is support for terrorism, not speech. Thus, even if Respondents were able to hypothesize a few instances in which the statute prohibits protected speech, those instances cannot be deemed "substantial" relative to the scope of the law's plainly legitimate applications.

IV. SECTION 2339B PLAYS AN IMPORTANT ROLE IN PROTECTING NATIONAL SECURITY

Amici include retired military personnel with expertise in national security matters. They have first-hand knowledge of the grave threat to our Nation's security posed by foreign terrorist organizations. Section 2339B plays an important role in containing that threat. *Amici* urge the Court to take that important role into account when considering Respondents' constitutional challenge to the statute.

In addition to PKK and LTTE, 42 other groups have been designated FTOs by the Secretary of State.[15]

---

[15] Information regarding the activities of those 44 FTOs are set forth in annual State Department reports. *See* Department of State, Office of the Coordinator for Counterterrorism, *Country Report on Terrorism 2008*, Chapter 6, "Terrorist Organizations," available at http://www.state.gov/s/ct/rls/crt/2008/122449.htm (last visited December 24, 2009). Among the other 42 FTOs are such well-known groups as al-Qaeda, HAMAS, and Hizballah. In the

If any significant portion of § 2339B is struck down, the ability of the federal government to prosecute those who supply training, specialized knowledge, personnel, and/or services to these 44 FTOs will be severely impaired. Supplying those resources strengthens the groups and thereby undermines U.S. interests, regardless whether those who do the supplying intend to limit their support to an FTO's "humanitarian" projects. As U.S. Senator John Kyle recently explained, "There is no such thing as 'good' aid to a terrorist organization, because all aid is fungible and can be converted to evil purposes, and because even humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 Cong. Rec. S15876 (2007).

The Justice Department has determined that the "material support statutes" (18 U.S.C. §§ 2239A and 2239B) are "critical features of law enforcement's current approach to counterterrorism." Testimony of Deputy Assistant Attorney General Gregory Katsas, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (May 10, 2005). Targeting those who provide the logistical support for terrorist groups – whether in the form of cash, materials, or services – is critical because "[p]eople who perform these services and fill these positions may not

---

years since it masterminded the 9/11 attacks in the United States that killed 3,000 people, al-Qaeda's operations have included numerous other attacks on civilian populations. HAMAS, which took control of Gaza from the Palestinian Authority in June 2007, has conducted repeated attacks on civilian targets in Israel. Hizballah's violent history includes the suicide truck bombings of the U.S. Embassy and U.S. Marine barracks in Beirut.

be bomb-throwers. But the frontline terrorists cannot operate without their supporters and their logistical support networks." *Id.* The Brief of the United States documents repeated instances in which the Justice Department has prosecuted individuals under the material support statutes for providing "training," "specialized knowledge," "personnel," and "services" to FTOs – the very provisions that Respondents seek to strike down on First and Fifth Amendment grounds.

This case was not filed because Respondents are actually confused about the reach of what they allege is an overly vague law. Rather, they filed suit because they wish to aid groups whose fights for human rights and ethnic self-determination they support. Congress and the Executive Branch have determined that such aid threatens the national security of the United States. *Amici* urge the Court not to second-guess that determination.

CONCLUSION

Amici curiae request that the Court reverse the judgment of the Ninth Circuit to the extent that it held certain portions of § 2339B void for vagueness, and affirm in all other respects.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: December 29, 2009

Counsel wish to thank Ian Gaunt, a student at Georgetown University Law Center, for his assistance in preparing this brief.

AMICUS CURIAE BRIEF

144 ⑧

Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

Case No. 08-1498

In the

Supreme Court of the United States

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET. AL,

Petitioners,

v.

HUMANITARIAN LAW PROJECT, ET. AL,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

Steven M. Freeman
Deborah Cohen Bensinger
Michael Lieberman
Steven C. Sheinberg
Anti-Defamation League
605 Third Ave.
New York, New York 10158
(212) 885-7735

David M. Raim
Counsel of Record
Kate McSweeny
Joy L. Langford
Philip J. Goodman
Chadbourne & Parke LLP
1200 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 974-5600

Counsel for Amicus Curiae

TC4TA
58XXV6

690 40

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. AEDPA's Prohibitions On Providing "Material Support Or Resources" To A Foreign Terrorist Organization Are Well-Within Constitutional Bounds And Key to The Nation's Interest In Fighting Terrorism 12

II. All Activities of A Terrorist Organization Are Inextricably Linked , Making It Impossible To Separate Social Services or Humanitarian Outreach from Support for Terrorist Activities 17

   A. The Kurdistan Workers' Party ("PKK") 19

   B. The Liberation Tigers of Tamil Eelam ("LTTE") 21

   C. Hamas 25

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Boim v. Holy Land Foundation for Relief & Development,
549 F.3d 685 (7th Cir. 2008), *cert den. Boim v. Salah*, 175 L. Ed. 2d 324, 2009 U.S. LEXIS 7577, 78 U.S.L.W. 3238 (Oct. 20, 2009) 15

Haig v. Agee, 453 U.S. 280 (1981) 11

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963)... 11

Humanitarian Law Project v. Mukasey,
509 F.3d 1122 (9th Cir. 2007) 8

Humanitarian Law Project v. Reno,
9 F. Supp. 2d 1176 (C.D. Cal. 1998) 31

Humanitarian Law Project v. Reno,
205 F.3d 1130 (9th Cir. 2000),
cert. denied 532 U.S. 904 (2001) 7-8

In re Extradition of Marzook,
924 F. Supp. 565 (S.D.N.Y. 1996) 25, 26

People of the State of New York v. Assi,
AD 7 9000, Indictment No. 4848/00
(Oct. 27, 2009) 2

Ungar v. Palestinian Authority,
304 F. Supp. 2d 232 (D.R.I. 2004).................... 27

United States v. Hammoud,
381 F.3d 316 (4th Cir. 2004) (*en banc*), *vacated for other reasons*, 543 U.S. 1097 (2005), and *reinstated in part*, 405 F.3d 1034 (4th Cir. 2005) 13

United States v. Lindh,
212 F. Supp. 2d 541 (E.D. Va. 2002) 13

United States v. Shah,
474 F. Supp. 2d 492 (S.D.N.Y. 2007) 13

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 3

United States Constitution and Statutes

Amendment I 2, 3, 10

Amendment V 10

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 .... *passim*

8 U.S.C. §§ 1189(a)(1-4) 14-15, 18-19, 21-22

18 U.S.C. § 2339A 12-13

18 U.S.C. § 2339B 5, 12, 13, 15

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762 4

N.Y. Penal Law § 485.05 2

Wis. Stat. Ann. § 939.645 3

Legislative Record

142 Congressional Record S3363 (Apr. 16, 1996)
(Statement of Senator Orrin Hatch (R-Utah)) .. 3

153 Congressional Record S15876 (Dec. 18, 2007)
(Statement of Senator Jon Kyl (R. Ariz.)) 8-9

House of Representatives Report No. 104-383
(1995) 9, 11, 17

Oversight Hearing
Aiding Terrorists: An Examination of the
Material Support Statute, 108th Congress 110
(2004) (Statement of Gary M. Bald) 6-7

Senate Hearing 108-918 (May 5, 2004)
(Statement of Christopher A. Wray) 16

Senate Hearing 108-918 (May 5, 2004)
(Testimony of Paul Rosenzweig) 31

Tools to Fight Terrorism Act of 2004:
Hearing on S. 2679 Before Senate Judiciary
Committee, 108th Cong. 4 (2004) 30

Other

62 Fed. Reg. 52650 (Oct. 8, 1997) 25

ADL Fact Sheets on Terrorism and Terrorist
Organizations http://www.adl.org........ 20, 22, 29

ADL Mission Statement,
http://www.adl.org/about.asp 1

Dallas Morning News, *5 Decry Jail Terms in Holy Land Case*, May 27, 2009 27

Hamas Covenant 1988,
(Yale Law School, Lillian Goldman Law Library)
http://avalon.law.yale.edu/20th_century/hamas.asp....................................... 25-26

Remarks by President Obama to the Turkish
Government (Apr. 6, 2009),
http://www.whitehouse.gov 19-20

N.Y. Times
James Brooke & Elaine Sciolino, *Bread or Bullets:Money for Hamas - A Special Report; U.S. Muslims Say their Aid Pays for Charity, Not Terror*, Aug. 16, 1995 20-21

Sri Lanka Says Leader of Rebels Has Died,
May 19, 2009 21

Sydney Morning Herald,
Funds Were For Tamil Tigers, Court Told,
Sept. 13, 2007 24

Tamils Rehabilitation Organisation Australia
("TRO") http://www.tro.org.au/ 24-25

U.S. Department of Justice Press Releases

Four Defendants Plead Guilty to All Charges, Including Conspiring to Acquire Anti-Aircraft Missiles and Provide Material Support to The LTTE, a Foreign Terrorist Organization (Jan. 27, 2009) 22-23

Four Plead Guilty to Conspiring to Provide Material Support to the LTTE, a Foreign Terrorist Organization (June 9, 2009)........ 22-23

Leader of American Branch of Sri Lankan Terrorist Group Arrested and Charged with Providing Material Support to a Terrorist Organization (Apr. 25, 2007) 22, 23

U.S. State Department,
Country Reports on Terrorism 2008 (April 2009)
http://www.state.gov/documents/organization/122599.pdf 20

U.S. State Department,
Report on Foreign Terrorist Organizations (July 7, 2009)
http://www.state.gov/s/ct/rls/other/des/123085
.... 14, 15

U.S. State Department,
Report on Terrorist Organizations (Apr. 30, 2007)
http://www.state.gov/s/ct/rls/crt/2006/82738.htm
.... 19, 21-22

U.S. Treasury Department Press Releases

Treasury Targets Charity Covertly Supporting Violence in Sri Lanka (Nov. 7, 2007) http://www.treas.gov/press/releases/hp683.htm 24

Treasury Designates the Union of Good (Nov. 12, 2008) http://www.treas.gov/press/releases/hp1267.htm.. 27

U.S. Treasury Department,
Terrorism and Financial Intelligence Report http://www.ustreas.gov/offices/enforcement/key-issues/protecting/charities_execorder_13224-e.shtml#h 27-28

U.S. Treasury Department
Terrorist Financing (Feb. 2008) http://www.treas.gov/offices/enforcement/money_laundering.shtml 18

Washington Post
Diaa Hadid, *Hamas-Linked Group Offers Cash For Israeli* Capture (Nov. 18, 2009) . 29

INTEREST OF THE *AMICUS CURIAE*

This brief is filed on behalf of the Anti-Defamation League ("ADL").[1] ADL is a 501(c)(3) not-for-profit organization founded in 1913 "to stop the defamation of the Jewish people and to secure justice and fair treatment of all."[2] In its almost 100 year history, ADL has become the premier civil rights organization in the country combating anti-Semitism and all forms of bigotry. ADL educates and informs the general public about prejudice and discrimination and has appeared as *amicus curiae* in a broad range of cases involving important questions of law regarding the separation of church and state, racial and religious discrimination and free speech.[3]

---

[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' general consent for *amicus curiae* to submit a brief in this proceeding are on file with the Court.

[2] ADL Mission Statement at http://www.adl.org/about.asp.

[3] A representative list of cases in which ADL has appeared as *amicus curiae* is available by category at http://www.adl.org/civil_rights/ab/. Most recently, on October 27, 2009, ADL moved the New York Court of Appeals to appear as *amicus curiae* on behalf of the People of the State of New

(Cont'd on following page)

As part of its mission, ADL has for decades been at the forefront of monitoring the actions of extremist groups domestically and world-wide, including groups identified by the United States Department of State (the "State Department") as foreign terrorist organizations.[4] It is ADL's belief that such groups pose a threat to the very things that allow a diverse society to flourish as well as to the physical safety and security of Americans and others throughout the world.

First and foremost, ADL is an advocate of the First Amendment rights guaranteed under the United States Constitution. Indeed, absent the guarantees provided under the First Amendment, ADL could not carry forth its own mission. It does not advocate for the official censorship of any person, group or organization. ADL recognizes, however, the distinct difference between speech and conduct, which is at the heart of the instant dispute before this Court. It has long advocated for the implementation of constitutionally sound laws that

---

(Cont'd from preceding page)

York in the matter of *People v. Mazin Assi*, with respect to the statutory construction of New York's Hate Crimes Statute (New York Penal Law § 485.05) and the public policy reasons for the New York Legislature's enactment of the law as it relates to crimes against property. That motion was granted on November 19, 2009.

[4] *See, e.g.*, ADL's regularly updated sections on extremism and terrorism on its website at http://www.adl.org.

will protect Americans not from the exercise of free speech rights but from the evil that can result from conduct engaged in to support hateful beliefs. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 480-81 (1993) (citing ADL's *amicus* brief and upholding Wisconsin's hate crimes statute, Wis. Stat. Ann. § 939.645, against a First Amendment challenge). ADL was, in fact, an early advocate of the government's ban on supporting the fundraising efforts of organizations designated as foreign terrorist organizations. *See, e.g.*, 142 Cong. Rec. S3363 (Apr. 16, 1996) (Statement of Sen. Orrin Hatch (R-Utah) acknowledging ADL's "strong work" in support of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 104th Cong. (1996)).

ADL actively monitors various foreign terrorist organizations, including the Kurdistan Workers' Party (the "PKK"), the Liberation Tigers of Tamil Eelam (the "LTTE") and Hamas, and can provide the Court with documented evidence of how the elaborate so-called "social service" networks maintained by these and similar organizations serve to nurture terrorist activities. Once resources are put into the hands of foreign terrorist organizations, how those resources are used is out of the control of even a high-minded, well-intentioned benefactor. While ADL is a strong believer in humanitarian outreach, such outreach must – and can be – constitutionally inhibited by law when the effect of the donation would be to strengthen an organization that exists for the purpose of harming the people of the United States or its allies.

In its dual role as an advocate of civil rights and liberties and an aggressive supporter of law enforcement and of the United States government's important efforts to fight international terrorism, ADL respectfully submits that it is uniquely qualified to assist the Court in this matter. ADL believes that it can be of assistance with respect to the application of the term "material support or resources" and the constitutionality of Section 303 of AEDPA, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, 108th Cong. (2004). ADL also can provide the Court with an exploration of the sound public policy reasons for the law proscribing Americans from providing "material support or resources" to foreign terrorist organizations under the mantle of humanitarian outreach.

SUMMARY OF ARGUMENT

> *"In all states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from the restraint and violence from others; which cannot be where there is no law; and is not as we are told, a liberty for every man to do what he lists."* --
>
> John Locke

In determining that international terrorism "threatens the vital interests of the United States," Congress concluded that material support from domestic donors to terrorist organizations facilitates and promotes international terrorism even where such support is directed to ostensibly "charitable" or "humanitarian" elements of such organizations. *See* AEDPA, codified at 18 U.S.C. § 2339B (Congressional Findings notes). Based on these findings, Congress deemed it necessary to prohibit the provision of material support to groups identified by the federal government as foreign terrorist organizations ("FTOs"), which it did by enacting AEDPA in 1996 and amending certain statutory provisions through the adoption of IRTPA in 2004. Providing material support and resources to terrorist organizations either directly or through their so-called charitable arms accomplishes two things, both of which are adverse to the best interests of the United States: (1) it allows the FTO to paint a benevolent picture of its role within the communities it is trying to reach, thereby enticing more followers, and (2) it allows the FTO to focus its existing resources on its terrorist activities.

The material support prohibitions enacted by Congress have proven to be an invaluable tool in the war on terrorism. As explained by Gary M. Bald, Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation, in a statement before the U.S. Senate Committee on the Judiciary:

> The material support statutes serve as the framework enabling a thorough and aggressive prosecution of the entire terrorist network – leaving the network without the necessary resources or personnel to conduct terrorist operations. These statutes, based upon a fundamentally simple concept, prohibit material support or resources to all individuals or entities that facilitate, plan or engage in terrorism. By criminalizing the actions of those who provide, channel or direct resources to terrorists or a U.S. designated Foreign Terrorist Organization, the material support statutes provide an effective tool to intervene at the earliest possible stage of terrorist planning in order to arrest terrorists and their supporters well before their violent plans come to fruition.

Oversight Hearing: Aiding Terrorists: An Examination of the Material Support Statute, 108th Cong. 110 (2004) (Statement of Gary M. Bald).

By striking down portions of the material support prohibitions, the court of appeals effectively deprives law enforcement of a tool that has proven critical to the federal government's counterterrorism efforts. If the court of appeals is not reversed, the ability of law enforcement to prosecute those who supply training, expert advice and/or services to FTOs will be critically diminished. Consequently, the FTOs will be strengthened. It matters not whether those who seek to supply training, expert advice and/or services have a specific intent to further the terrorist activities of the FTOs. (Indeed, *Amicus* concedes that in the instant case the Respondents' interests appear genuinely to lie in teaching and training members of the PKK and LTTE in how to use humanitarian and international law with respect to relief efforts.) The benefits of such outreach, however, do not diminish the risk that if Americans are allowed to make such donations, resources would be freed up within the associated FTOs to further the terrorist aims of the organizations. As the court of appeals noted in its 2000 opinion:

> [E]ven contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support

> intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.

Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (citing *Amicus* ADL's brief submitted in support of the government).[5] Senator Jon Kyl (R-Arizona) echoed this sentiment in 2007: "'There is no such thing as 'good' aid to a terrorist organization, because all aid is fungible and can be converted to evil purposes, and because even humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 Cong. Rec. S15876 (Dec. 18, 2007).

---

[5] ADL appeared as *amicus curiae* in the 1999 proceeding before the Court of Appeals for the Ninth Circuit, *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), in which it similarly asserted that Congress had correctly ascertained that material support or resources proffered by donors in the United States to foreign terrorist organizations serves to facilitate and promote terrorism even when the donations are directed to the humanitarian efforts of those organizations. In that instance, the court of appeals acknowledged that "there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor . . . is there a right to provide resources with which terrorists can buy weapons and explosives." *Id.* at 1133. The court of appeals, however, found the terms "training" and "personnel" to be impermissibly vague, in that neither were specifically defined. Seven years after that decision and three years after the terms "training," "expert advice and assistance" and "personnel" were defined under IRTPA, the court of appeals determined that Congress resolved the vagueness problem with respect to the definition of "personnel," but held that the term "training" remains vague, as do the terms "expert advice or assistance" and "service." *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

The Congressional findings are clear: donations of material support or resources to an FTO place the interests of the nation and the safety of the American people at grave risk. In the face of such findings, Congress was left to balance our civil liberties and our nation's response to terrorism. The legislative history of AEDPA shows that in undertaking this balancing process, Congress was cognizant of the First Amendment concerns and seriously examined the constitutional issues raised by a ban on material support. *See* H.R. Rep. No. 104-383, at 43-45 (1995). It recognized that such a ban could not "attempt to restrict a person's right to join an organization." *Id.* Any ban had to be limited to a "contribution of financial or material resources" to an FTO. *Id.* Ultimately, Congress rightfully concluded that our government's interest in protecting the nation from the threat of terrorism can only be served by a legislative ban on material support, and in enacting that ban it made clear what constitutes "material support" or "resources." Just as it did in 1999, ADL continues to firmly believe that the conduct outlawed by AEDPA, as amended by IRTPA, does not qualify as "protected speech" under the First Amendment and, in fact, is not speech at all. Moreover, it believes that the Due Process Clause of the Fifth Amendment is not implicated because the terms "training," "expert advice or assistance," and "service" are facially clear and not vague. As such, ADL urges this Court to reverse the court of appeals insofar as it found these terms to be vague and otherwise to affirm so that AEDPA can be applied as written for the safety and security of our nation.

ARGUMENT

At its core, the material support statute protects the very liberty the Respondents claim the statute violates. In advocating aggressively against the material support statute – and stressing the First Amendment rights to speech and association and the Fifth Amendment Due Process Clause – Respondents have lost sight of the fact that there can be no enjoyment of rights under the First and Fifth Amendments unless we as a nation first ensure that our people remain free from the violence of others.

Terrorism cases are often characterized, as the Respondents seek to do, as a struggle between the right of individuals to be free (including the rights of putative terrorists) and the right of society to remain safe. Despite the Respondents' claims, this dilemma plays no role in this case. At its core, the material support statute protects democracy from an internal contradiction: the allowance of a person to exercise their putative right to fund and to train those who use violence undermines the very state that protects that putative right. In short, neither the First Amendment nor the Due Process Clause can logically or legally require their use to support organizations that would use violence to destroy the very democracy from which these provisions derive their meaning and operation. Permitting such an abuse of democracy would be unprecedented. After all, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee,* 453 U.S. 280, 309-10 (1981) (quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 160 (1963)).

If the decision below is allowed to stand, our nation's ability to effectively wage war against terrorism will be significantly impaired and our national security interests severely short-changed. This is a grave risk that cannot be justified, especially in light of the fact that the alternative of upholding the material support statute as written will not unconstitutionally curtail the civil liberties Respondents seek to protect.[6] Applying the material support laws as written will protect the American people from the restraint and violence that FTOs seek to impose. Only in a society where such protection exists can civil liberties flourish.

---

[6] *See* H.R. Rep. No. 104-383, at 45 (1995): "The ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups, overseas."

I. AEDPA's Prohibitions On Providing "Material Support Or Resources" To A Foreign Terrorist Organization Are Well-Within Constitutional Bounds And Key to The Nation's Interest In Fighting Terrorism

"[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." 18 U.S.C. § 2339B (Congressional Findings, note 7). Section 303(a) of AEDPA, as codified at Section 2339B(a)(1) of Title 18 of the United States Code, provides that a person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" may be criminally charged. The law requires that the person have "knowledge that the organization is a designated terrorist organization" under AEDPA or otherwise have knowledge that the organization engages in terrorist activity as specified under certain other federal laws. 18 U.S.C. § 2339B(a)(1). "Material support or resources" is defined under the statute as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and

> transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b).

The purpose behind 18 U.S.C. § 2339B is to stop *terrorist groups* from gathering strength. The statute is not intended to impinge upon an individual's freedom of association or freedom of speech or to reach any other constitutionally-protected conduct. *See, e.g., United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (*en banc*), *vacated for other reasons*, 543 U.S. 1097 (2005), and *reinstated in part*, 405 F.3d 1034 (4th Cir. 2005) (prosecuting charges of fundraising for Hezbollah is not a constitutional violation because § 2339B does not target advocacy and is unrelated to the suppression of free expression); *United States v. Shah*, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007) (finding no evidence that "§ 2339B reaches any, let alone a substantial amount of, constitutionally protected conduct"); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (training young men in the Pacific Northwest for jihad and distributing jihadi training manuals over a terrorist website can be found to be illegally providing material support and resources to Al Qaeda without violating the defendant's constitutional rights).

Congress' reasoning behind enacting AEDPA is simple and sound: money is fungible. When monetary gifts and other material support or resources are donated to an FTO, it allows the FTO to allocate its assets most efficiently for its needs. A substantial motivation for designating a terrorist organization as an FTO is to cut-off that financial pipeline. In fact, the State Department has articulated five substantive advantages in the fight against terrorism that are realized through designating terror organizations as FTOs: (1) it curbs terrorism financing and encourages other countries to do the same; (2) it stigmatizes and isolates FTOs internationally; (3) it deters donations and contributions and economic transactions with FTOs; (4) it increases "public awareness and knowledge of terrorist organizations"; and (5) it signals to other governments the United States' concerns about the FTOs. U.S. State Department, Report on Foreign Terrorist Organizations (July 7, 2009), at http://www.state.gov/s/ct/rls/other/des/123085.htm.

Numerous safeguards are in place to ensure that only the most dangerous organizations are designated as FTOs. The Secretary of State must reach the decision in consultation with the Attorney General and the Secretary of the Treasury after the compiling and review of an investigative record (which may include classified information), and she must notify Congress seven days in advance of the designation taking effect, after which the designation is published in the Federal Register; furthermore, the designation is subject to judicial review, and may be revoked following a review of the designation by the Secretary of State or legislatively by Congress at any time. 8 U.S.C. §§ 1189(a)(1-4). Once a terrorist organization is designated an FTO, any of its assets that are under the control of a United States financial institution may be frozen at the direction of the Secretary of the Treasury. 8 U.S.C. § 1189(a)(2)(C).

Currently, 45 organizations are designated FTOs, including the PKK, the LTTE, Hamas and other terrorist groups that regularly appear on newspaper front pages due to their heinous and atrocious actions. U.S. State Department, Report on Foreign Terrorist Organizations (July 7, 2009). Many of these organizations raise money through their so-called charitable arms, creating false illusions that can attract innocent donors. This is why a high bar was set under the statute before criminal liability attaches: the donor must know that the material support or resources are going to an FTO. 18 U.S.C. § 2339B(a)(1). A person, however, who "knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698-99 (7th Cir. 2008), *cert den. Boim v. Salah*, 175 L. Ed. 2d 324, 2009 U.S. LEXIS 7577, 78 U.S.L.W. 3238 (Oct. 20, 2009).

A ruling upholding the court of appeals' determination that the terms "training," "expert advice or assistance" and "services" are unconstitutionally vague would undermine the very purpose of enacting the material support prohibitions, *i.e.*, leaving the FTOs without the necessary resources or personnel to conduct terrorist operations. *See* 18 U.S.C. § 2339B (Congressional Findings, note 6). Any quantum of training, advice, services or personnel that is donated to an FTO from within the United States, is a valuable commodity that once in the hands of an FTO will allow that FTO to maximize its assets and funnel more money into its terrorist activities. The avoidance of such a dangerous result by adherence to the material support prohibitions does not mean that an individual's right to associate or right to political advocacy or right to pursue philanthropic goals will be curtailed. AEDPA in no way attempts to restrict a person's right to join an organization so long as that person refrains from providing material support to the organization if it is a designated FTO; nor does the law prohibit a person's right to espouse a particular political view or ideology.[7] Moreover, people within the United States have an absolute right to contribute material support and/or resources to myriad *legitimate* non-governmental organizations ("NGOs") and charitable organizations doing work around the world. These organizations are well-positioned to help people in need without any of the risk associated with providing material support to FTOs.

---

[7] *See* Statement of Christopher A. Wray, Assistant Attorney General, Criminal Division Before the Committee on the Judiciary United States Senate (May 5, 2004):

> "[T]he material support statutes do not, and should not, prohibit people from believing what they want, however misguided, advocating what they believe in and acting independently and nonviolently based on their beliefs. It is only when someone crosses the line between advocacy and action on behalf of terrorists or a designated foreign terrorist group that they can and should be prosecuted. As Judge William Skretny told Shafal Mosed . . . when sentencing him to eight years in prison, the material support offense 'is not a thought crime,' and that '[i]f you had supported Al Qaeda in your heart only, you would not be here today.' Rather, Judge Skretny said, he was being punished because he 'made the decision to take action.' In short, neither the statutes nor our enforcement of them infringes First Amendment rights."

S. Hrg. 108th Cong. 185-86 (2004).

II. All Activities Of A Terrorist Organization Are Inextricably Linked, Making It Impossible To Separate Social Services or Humanitarian Outreach from Support for Terrorist Activities

"[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to" an FTO to "defray the cost to the terrorist organization of running . . . ostensibly legitimate activities," their contribution of such material support serves to free up other money that can then be used to purchase weapons or in other ways to facilitate terrorism. *See* H.R. Rep. No. 104-383, at 81 (1995). Moreover, charities, social service programs and/or schools operated by FTOs and funded by "humanitarian" aid often operate as part of a culture of hate and violence. Such programs can and do nurture potential terrorists, setting and keeping them on the path to violence, destruction and murder.[8]

In enacting AEDPA, Congress understood the necessity for a ban on providing support for designated foreign terrorist organizations which would be as comprehensive as possible. Congress recognized that the social service networks of foreign terrorist organizations are inextricably connected to the terrorist programs of these organizations. Therefore, Congress reasoned, it is not sufficient to stop the flow of money explicitly intended by the donor for purchasing arms and funding violence. All aid to terrorists must be banned.

The decision below undermines the statutory scheme created by Congress for the purpose of banning aid to international terrorists. Under the injunction confirmed by the court of appeals, Respondents are free to provide "training," "expert advice or assistance" and "service" to the Liberation Tigers of Tamil Eelam ("LTTE") and the Kurdistan

---

[8] "Terror networks often use compromised or complicit charities and businesses to support their objectives." U.S. Treasury Dept., Terrorist Financing 8 (Feb. 2008), at http://www.treas.gov/offices/enforcement/money_laundering.s html. Terrorist organizations "can utilise affiliated charities as a source of financing that may be diverted to fund terrorist attacks and terrorist recruitment by providing a veil of legitimacy over an organisation based on terrorism." *Id.*

Workers' Party ("PKK"), organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of the United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). And, of course, any weakening of these prohibitions will extend to support of other FTOs, such as the violent Middle East organization called Hamas.

A. The Kurdistan Workers' Party ("PKK")

The PKK's political interest from its inception has been to force the creation of a separate nation for Turkish Kurds. The PKK is, however, a full-fledged FTO capable of horrific terrorist acts, many of which have been carried out in recent years against Turkish tourist destinations, hotels and resorts. U.S. State Dept., Terrorist Organizations 17, at http://www.state.gov/s/ct/rls/crt/2006/82738.htm. President Obama recently made clear that the United States believes the PKK to be a continuing terrorist threat:

> Make no mistake. . .: Iraq, Turkey, and the United States face a common threat from terrorism. That includes the al Qaeda terrorists who have sought to drive Iraqis apart and destroy their country. That includes the PKK. There is no excuse for terror against any nation. . . . As President, and as a NATO ally, I pledge that you will have our support against the terrorist activities of the PKK or anyone else. These efforts will be strengthened by

> the continued work to build ties of cooperation between Turkey, the Iraqi government, and Iraq's Kurdish leaders, and by your continued efforts to promote education and opportunity and democracy for the Kurdish population here inside Turkey.

Remarks by President Obama to the Turkish Government (Apr. 6, 2009), at http://www.whitehouse.gov.

"Historically, support for the PKK has come from an extensive network of displaced Kurds living throughout Europe, and a number of governments, including Syria, Iraq and Iran." U.S. State Department Country Reports on Terrorism 2008 http://www.state.gov/documents/organization/122599.pdf. In addition, the PKK has availed itself of a number of PKK-run NGOs and charitable organizations that basically serve to launder money raised through contributions. ADL PKK Fact Sheet, at http://www.adl.org/terrorism /symbols/pkk_1.asp. It is impossible to verify the final destination or ultimate use of a "charitable" contribution within the budget of a terrorist organization. Even if a donor's purported intent is to provide money and other support for what they say are lawful, nonviolent activities of the PKK and the Tamil Tigers (as Respondents have claimed there intent to be), there is no guarantee that the money or support will be used that way. On the contrary, "[o]nce the charity money hits its foreign destination, it is very difficult to determine where it really goes," according to Oliver B. Revell, a Texas security consultant who previously served as the Deputy Director of the FBI. James Brooke & Elaine Sciolino, *Bread or Bullets: Money for Hamas - A Special Report; U.S. Muslims Say their Aid Pays for Charity, Not Terror,*" N.Y. Times, Aug. 16, 1995, at A1.

The PKK insurgency is 5,000 strong with more than half of the insurgents living across the Turkish border in Iraq. U.S. State Dept., Terrorist Organizations 17. Clearly, the PKK remains positioned to strike. Affirmation of the court of appeals' ruling will allow the PKK not only to maintain that position but to strengthen it.

B. The Liberation Tigers of Tamil Eelam ("LTTE")

The LTTE is reported to be approximately 10,000 strong. *Id.* at 19.[9] The LTTE was reportedly behind

---

[9] In a sudden political turn, on May 18, 2009, after a 26-year civil war between the Sinhalese majority in Sri Lanka and the Tamil minority, the Sri Lankan government declared the war over and the LTTE-led Tamil rebels defeated. *See, e.g., Sri Lanka Says Leader of Rebels Has Died,* N.Y. Times, May 19, 2009. This development should not be viewed as eliminating the possibility that elements of the LTTE continue to operate. In fact, it is a near certainty that such elements exist and continue to operate. Accordingly, there has been no action by the Secretary of State to revoke the designation of the LTTE as an FTO which she may do "at any time" if she concludes that "circumstances that were the basis

(Cont'd on following page)

the assassinations of the Indian prime minister in 1991 and the Sri Lankan president in 1993, *id.*, and is infamous for its terrorist tactics, including using women and children as suicide bombers, *id.*; ADL LTTE Fact Sheet, *at* http://www.adl.org/terrorism/symbols/liberation_tigers_te1.asp.

The "LTTE relies on sympathetic Tamil expatriates residing in the United States, Canada, the United Kingdom, Australia, France and several other countries to raise and launder money; smuggle arms, explosives, equipment, and technology into LTTE-controlled territory; obtain intelligence about the Sri Lankan government; and spread propaganda." Press Release, Dept. of Justice, *Leader of American Branch of Sri Lankan Terrorist Group Arrested and Charged with Providing Material Support to a Foreign Terrorist Organization* (Apr. 25, 2007), at http://www.justice.gov/usao/nye/pr/2007/2007Apr25.html. In order to coordinate these activities the LTTE had established "branches" in at least 12 countries, including the United States. *Id.* In the first six months of 2009 alone, eight people pled guilty in New York for providing material support in the form of money and weapons to the LTTE in violation of AEDPA and other U.S. laws. *See* Press Releases, Dept. of

---

(Cont'd from preceding page)

for the designation have changed in such a manner as to warrant revocation." 8 U.S.C. § 1189(a)(6)(A).

Justice, Jan. 27, 2009 and June 9, 2009, at http://newyork.fbi.gov/press.htm.

Included in the group of eight was the leader of the U.S. branch of the LTTE, Karunakaran Kandasamy, (also known as "Karuna"). The defendants operated the American branch of the LTTE through an organization called the World Tamil Coordinating Committee (the "WTCC"). The government charged that the WTCC oversaw and directed the LTTE's activities in the United States, including fundraising. In the summer and fall of 2004, for example, the LTTE undertook a major worldwide campaign to raise money for its planned offensive against the Sri Lankan government in late 2005. In support of this planned offensive, Karuna held fundraising events in November and December 2004 at a church and a public high school in Queens, New York, and a school in South Brunswick, New Jersey. Hundreds attended. http://www.justice.gov/usao/nyc/pr/2007/2007Apr25.html.

According to the criminal complaint filed against the defendants, Karuna also was responsible for arranging meetings in LTTE-controlled territory in Sri Lanka between LTTE leaders and prominent LTTE supporters from the United States. These supporters typically have backgrounds in engineering, technology, weaponry, medicine and other scientific fields. Karuna and his subordinates also assisted LTTE intelligence agents in researching military technology.

In addition, millions of dollars per year are funneled to the LTTE through charity organizations purporting to support Tamil humanitarian aid. U.S. State Dept., Terrorist Organizations 19; ADL LTTE Fact Sheet.[10] Much of the money raised in the United States that goes to the LTTE was laundered through the "Tamil Rehabilitation Organization," ("TRO") a charitable arm of the LTTE that the Treasury Department designated as a Specially Designated Global Terrorist in November 2007. Press Release, U.S. Treasury Dept., *Treasury Targets Charity Covertly Supporting Violence in Sri Lanka* (Nov. 15, 2007), at http://www.treas.gov/press/releases/hp683.htm. The Treasury Department noted that "TRO's efforts worldwide reportedly have allowed the LTTE to use humanitarian aid, which TRO collected from the international community after the December 2004 tsunami, to launch new campaigns to strengthen LTTE military capacity." *Id.* In addition, Treasury found the TRO to be the LTTE's "preferred conduit of funds from the United States to the LTTE in Sri Lanka."[11] *Id.*

---

[10] In May 2007, three men were prosecuted in Australia on charges related to fundraising for the LTTE "under the guise it was donations for charitable projects and included money raised after the 2004 Tsunami." Sydney Morning Herald, *Funds Were For Tamil Tigers, Court Told*, Sept. 13, 2007.

[11] TRO's Australian operation continues to have an accessible (although dated) website, in which it describes itself as a non-governmental agency "providing expertise and

(Cont'd on following page)

C. Hamas

Like the PKK and the LTTE, Hamas is a prominent example of the dangers that AEDPA is intended to address. Hamas – along with Hezbollah, al-Jihad, the PKK, the LTTE and others – was classified as an FTO more than a dozen years ago. 62 Fed. Reg. 52650 (Oct. 8, 1997). Hamas is a terrorist organization that "seeks the establishment of a Palestinian identity and homeland." *In re Extradition of Mousa Mohammed Abu Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996). Hamas' charter contains numerous references to the destruction of the Israel and the elimination of the Jewish people, including such pledges as:

> Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it;
>
> and

(Cont'd from preceding page)

funds for the relief, rehabilitation and development of North East Sri Lanka." *See* TRO Australia at http://www.tro.org.au/. Among the projects it describes are "TRO's Nutrition Rehabilitation Programme" aimed at addressing malnutrition in children under the age of five and the "Deaf and Blind Institute for Children," for which it is seeking donations to care for the 82 residents it allegedly supports. *Id.*

> [T]he Islamic Resistance Movement [Hamas] aspires to the realization of Allah's promise, no matter how long that should take. The Prophet, Allah bless him and grant him salvation, has said: "The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews."

Hamas Covenant 1988 (Yale Law School, Lillian Goldman Law Library), at http://avalon.law.yale.edu/20th_century/hamas.asp.

Hamas establishes itself in part through "education, health care, and other social services," but also engages in overt and horrific acts of terrorism, including "indiscriminate bombing of buses laden with civilians and other such types of attacks targeted at civilians." *In re Extradition of Mousa Mohammed Abu Marzook*, 924 F. Supp. at 568, 577. Hamas' far-reaching tentacles into the United States and other affluent countries reveals how seamless terrorism and social programs can be and why Congress and the courts must be vigilant in protecting Americans from ostensibly charitable donations that once made are converted to whatever use the FTO recipient chooses to make.

On May 27, 2009, a federal court in Dallas, Texas sentenced five founders and fundraisers of the Holy Land Foundation following their November 2008 conviction for Hamas-related fundraising activities. In the years since Hamas was designated a terrorist organization by the U.S. government, the Holy Land Foundation has funneled more than $12 million dollars to it. *See, e.g., 5 Decry Jail Terms in Holy Land Foundation Case*, Dallas Morning News, May 28, 2009; *see also Estates of Yaron Ungar v. Palestinian Auth.*, 304 F. Supp. 2d 232, 242 (D.R.I. 2004) (describing the Holy Land Foundation as acting "as Hamas' fund-raising agent in the United States"). The Holy Land Foundation was shut down largely on the basis of the material support statutes, including AEDPA.

Hamas is also allied with Union of Good, a Saudi-based organization specifically created to transfer funds from a web of charitable organizations into the hands of "Hamas members and the families of terrorist operatives." Press Release, U.S. Treasury Dept., *Treasury Designates the Union of Good* (Nov. 12, 2008), at http://www.treas.gov/press/ releases/ hp1267.htm. Hamas' annual budget is estimated at $70 million, with approximately 85% of that coming from Iran, Saudi Arabia and charitable donations funneled through United States-based charities. U.S. Treasury Dept., Terrorism and Financial Intelligence Rpt., at http://www.ustreas.gov/offices/ enforcement/key-issues/protecting/charities_ execorder_13224-e.shtml#h. Hamas is a very visible example of the reason AEDPA was enacted; the type of health and welfare services that an FTO may offer to its constituents enhances its credibility and political strength, and thereby its ability to conduct terrorist operations.

The Treasury Department recognizes the risk of making charitable contributions that ultimately support Hamas:

> Hamas raises tens of millions of dollars per year throughout the world using charitable fundraising as cover. While Hamas may provide money for legitimate charitable work, this work is a primary recruiting tool for the organization's militant causes. Hamas relies on donations from Palestinian expatriates around the world and private benefactors located in moderate Arab states, Western Europe and North America. Hamas uses a web of charities to facilitate funding and to funnel money. Charitable donations to non-governmental organizations are commingled, moved between charities in ways that hide the money trail, and are then often diverted or siphoned to support terrorism.

U.S. Treasury Dept., Terrorism and Financial Intelligence Rpt.

This description of Hamas' endeavors can just as easily be applied to many other FTOs and their charitable arms, including those at issue here. The structure and operation of organizations such as Hamas demonstrates that the decision by Congress to ban giving material support or resources to FTOs is well justified. The division of Hamas into military and political/social wings has led some people to assume that there is a separation between the two. Such assumptions could not be more wrong: "funds raised for the social programs of Hamas free up other funds for the military wing and there is no open accounting system whereby the international community can ascertain whether or not the social wing finances the military wing." *See* ADL Hamas Fact Sheet, at http://www.adl.org/main_israel/hamas_facts.htm. Indeed, humanitarian donations made in the United States can and do go to reward the families of Hamas suicide bombers. *Id.* Moreover, in November 2009, a Hamas-related charitable organization offered a $1.4 million dollar reward to any Arab living in Israel who could capture an Israeli soldier. Diaa Hadid, *Hamas-Linked Group Offers Cash for Israeli* Capture, Wash. Post, Nov. 18, 2009 (noting that Hamas is believed to have millions of dollars at its disposal). Cutting off monetary or in-kind donations to FTOs and their charitable entities will keep money out of the hands of the terrorists. That will save lives.

Monetary or in-kind donations made by Americans that allow terrorist organizations to (1) enhance their credibility with their constituents and on the world stage and (2) shift funds to their terrorist endeavors are banned for good reason. A person of ordinary intelligence knows the reasons for that ban and what contributing material support or resources would include without any need for Congress to define or redefine "training," "expert advice or assistance," "service" or "personnel." ADL is extremely vigilant in seeking to protect our citizens' civil liberties. However, we also must provide the tools needed by law enforcement to provide for the nation's security.[12] The material

---

[12] There is solid evidence that the material support prohibitions are advancing our nation's goals in the war on terrorism. Barry Sabin, chief of the counter-terrorism section of the criminal division of the United States Department of Justice, addressed this issue with members of a United States Senate subcommittee in 2004. He informed the subcommittee that the Justice Department had successively disrupted terrorist acts "due to the wide array of legislative tools provided by Congress, particularly the material support statutes." *See* Tools to Fight Terrorism Act of 2004: Hearing on S. 2679 Before Senate Judiciary Committee, 108th Cong. 4 (2004). He described the material support statutes as "the backbone and the lifeblood of [the Justice Department's] Article 3 judicial prosecutions in the post-9/11 realm." *Id.* Mr. Sabin pointed to examples of how the Justice Department relied upon the material support statutes for achieving indictments against a number of individuals and organizations, including against the U.S.-based Holy Land Foundation for "conspiring to provide material support to Hamas over the last decade." *Id.* On the other hand, there are no examples to cite in which the material support prohibitions have been invoked to infringe on civil rights or liberties. While AEDPA's prohibition on providing material support to foreign terrorist organizations does prohibit the provision of training, expert advice and services to the PKK and LTTE, Respondents are not barred from participating in other forms of political expression and association on behalf of the PKK's and LTTE's allegedly legitimate goals. Respondents are "free to spend money themselves, such as distributing information about the plight of the Kurds and Tamils; are free to associate with others to express their

(Cont'd on following page)

support laws fall on the constitutional side of the line: there is no inalienable right to donate material support or resources to a designated foreign terrorist organization. The dangers of doing so cannot be overstated.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Ninth Circuit should be reversed with respect to its decision that the term

---

(Cont'd from preceding page)

advocacy of the PKK's and LTTE's political and humanitarian goals; and are free to provide direct humanitarian aid to individuals who need it." *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1197 (C.D. Cal. 1998). *See also Testimony of Paul Rosenzweig Senior Legal Research Fellow Center For Legal And Judicial Studies, The Heritage Foundation Before the United States Senate Committee On The Judiciary* (May 5, 2004) at 170 ("[T]here are no 'actual facts' of abuse that have been reported – no public advocates criminalized for their political speech.").

"training," "expert advice or assistance" and "service" are unconstitutionally vague. In all other respects, its decision should be affirmed.

Dated: November 23, 2009

Respectfully submitted,

David M. Raim
Counsel of Record
Kate McSweeny
Joy L. Langford
Philip J. Goodman
Chadbourne & Parke LLP
1200 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 974-5600

Steven M. Freeman
Deborah Cohen Bensinger
Michael Lieberman
Steven C. Sheinberg
Anti-Defamation League
605 Third Ave.
New York, New York 10158
(212) 885-7735

Counsel for Amicus Curiae

AMICUS
CURIAE
BRIEF

8 pages
Batch 014

147 ⑨ ⑥ Nos. 08-1498 and 09-89

Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

◆

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Petitioners,

—v.—

HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CARTER CENTER, CHRISTIAN PEACEMAKER TEAMS, GRASSROOTS INTERNATIONAL, HUMAN RIGHTS WATCH, INTERNATIONAL CRISIS GROUP, THE INSTITUTE FOR CONFLICT ANALYSIS AND RESOLUTION AT GEORGE MASON UNIVERSITY, THE KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES AT NOTRE DAME UNIVERSITY, OPERATION USA, AND PEACE APPEAL FOUNDATION IN SUPPORT OF HUMANITARIAN LAW PROJECT, ET AL.

MELISSA GOODMAN
Counsel of Record
STEVEN R. SHAPIRO
JAMEEL JAFFER
LAURENCE M. SCHWARTZTOL
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

59BW1K
TC+TA

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE STATUTE'S PROHIBITIONS ON "SERVICE[S]," "TRAINING," "EXPERT ADVICE AND ASSISTANCE," AND "PERSONNEL" ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO PLAINTIFFS AND THREATEN TO CRIMINALIZE ACTIVITIES THAT ARE PROTECTED BY THE FIRST AMENDMENT 7

  A. Teaching and Instruction in Peace-Building Skills 12

  B. Conflict Resolution and Mediation 15

  C. Advocacy Directed at Violent Actors 18

  D. Independent Advocacy That Could Be Perceived as "For the Benefit of" Others 24

  E. Humanitarian Aid 25

II. TO THE EXTENT THAT THE STATUTE DOES PUNISH SPEECH AND ADVOCACY INTENDED TO FURTHER LAWFUL ACTIVITY, THE STATUTE VIOLATES THE FIRST AMENDMENT 29

A. The Government May Not Punish Speech Based On Fear Of A Third-Party's Potential Unlawful Conduct Unless The Speaker Intends To Incite Imminent Unlawful Conduct. 30

B. This Constitutional Violation Cannot Be Cured Simply By Making It Contingent On Association With Designated Group 33

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)..33

Bartnicki v. Vopper, 532 U.S. 514 (2001) 30

Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)..12

Brandenburg v. Ohio, 395 U.S. 444 (1969).........31, 33

Chicago v. Morales, 527 U.S. 41 (1999) 8

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 7

Cox v. State of La. 379 U.S. 536 (1965) 30

De Jonge v. State of Or., 299 U.S. 353 (1937).....32, 35

Dennis v. United States, 341 U.S. 494 (1951)...........12

Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).....9

Grayned v. City of Rockford, 408 U.S. 104 (1972)...7, 8

Griswold v. Connecticut., 381 U.S. 479 (1965) 12

Healy v. James, 408 U.S. 169 (1972) 35

Hill v. Colorado, 530 U.S. 703 (2000) 12

Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009)..............................9, 10

Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938)....32

Martin v. City of Struthers, Ohio, 319 U.S. 141 (1943)...12, 32

N.Y. Times v. Sullivan, 376 U.S. 254 (1964) 30

NAACP v. Button, 371 U.S. 415 (1963) 12, 30, 36

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) .... *passim*

NAACP v. State of Ala. ex rel. Patterson,
357 U.S. 449 (1958) 12

Scales v. United States, 367 U.S. 203 (1961) 34

Smith v. Goguen, 415 U.S. 566 (1974) 7, 8, 9

Thomas v. Collins, 323 U.S. 516 (1945) 32

United States v. Robel, 389 U.S. 258 (1967) 35

Vill. of Schaumburg v. Citizens for a Better Env't,
444 U.S. 620 (1980) 12

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 7

Virginia v. Black, 538 U.S. 343 (2003) 31

Whitney v. California, 274 U.S. 357 (1927) 12

Statutes

18 U.S.C. § 2339A

- § 2339A(b) 9
- § 2339A(b)(1) 2
- § 2339A(b)(3) 10

18 U.S.C. § 2339B

- § 2339B(a)(1) 1
- § 2339B(h) 11

8 U.S.C. § 1189 1

Other Authorities

Ahilan T. Arulanantham, *Testimony at Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary* (May 10, 2005) 28

Gady A. Epstein, *Maryland MD Struggles for Tamil Patients*, Balt. Sun, Jan. 23, 2005 28

Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (Dec. 2008) 20

Human Rights Watch, *Civilians under Assault Hezbollah's Rocket Attacks on Israel in the 2006 War* (Aug. 2007) 20

Human Rights Watch, *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka* (Nov. 2004) ... 20

Human Rights Watch, *"You'll Learn Not To Cry": Child Combatants in Colombia* (Sept. 2003) 20

Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians* (Oct. 2002) 20

Human Rights Watch, *Beyond Negotiation: International Humanitarian Law and its Application to the Conduct of the FARC-EP* (Aug. 2001) 20

INTEREST OF *AMICI*

Amici file this brief in support of plaintiffs' as applied challenge to the constitutionality of 18 U.S.C. § 2339B. *Amici* are a diverse coalition of conflict resolution, human rights, humanitarian aid, academic, and advocacy organizations that share a profound concern about the implications of the material support statute for their efforts to foster peace, further human rights, and alleviate human suffering around the world.[1]

The challenged statute makes it a crime punishable by up to 15 years in prison to provide "material support or resources" to an organization the Secretary of State has designated a "foreign terrorist organization" (FTO). 18 U.S.C. § 2339B(a)(1); *see also* 8 U.S.C. § 1189. These severe criminal penalties attach whether or not the provider of "material support" intends to further the designated organization's violent or unlawful aims. Under the statute, it is enough that the provider knows "that the organization is a designated terrorist organization [or] has engaged or engages in terrorist activity." 18 U.S.C. § 2339B(a)(1). Thus, a provider can be held criminally liable even if he or she opposes the terrorist activities of the designated group and even if the support is intended to further entirely peaceful, lawful objectives. Moreover, "material support" is defined broadly to include, among other things, any "service," "training," "expert advice or assistance," or "personnel." *Id.* at § 2339A(b)(1). Each of these terms is vague and sweeping, and potentially proscribes a wide range of speech and advocacy that is protected by the First Amendment and necessary to *amici's* work.

---

[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

Amici emphatically oppose terrorism. However, peace-making, conflict resolution, human rights advocacy, and the provision of aid to needy civilians sometimes requires direct engagement with groups and individuals that resort to or support violence, including some that are, have been, or might in the future be designated as FTOs. For example, effective conflict resolution often requires negotiating and mediating with armed actors, and providing each side to a conflict with strategic advice or expertise. Effective advocacy for peace often requires direct persuasion and lobbying of armed actors to choose non-violent means to achieve their ends. Effective human rights advocacy often requires directly persuading the perpetrators of abuses to cease their rights-violating practices, explaining to the perpetrators their obligations under human rights and humanitarian law, and advising the perpetrators how to comply with those obligations. Similarly, effective aid distribution, disaster relief, and development efforts in conflict zones where violent actors dominate may require advising, sharing expertise, and negotiating with local partners, some of whom may personally support or be members of groups that engage in violence.

All of this work is intended to further lawful ends, not terrorism. However, as a result of the breadth and vagueness of the material support statute's terms, it is unclear to *amici* whether these kinds of activities – many, if not all, of which are protected by the First Amendment – could expose them to the risk of severe criminal penalties if they involve a group or members of a group that the U.S. government has, or may in the future, designate as an FTO.

The Carter Center, in partnership with Emory University, is guided by a fundamental commitment to human rights and the alleviation of human suffering. It seeks to prevent and resolve conflicts, enhance freedom and democracy, and improve health. Founded in 1982 by former U.S. President Jimmy Carter and former First Lady Rosalynn Carter, the Center has helped to improve the quality of life for people in more than 70 countries.

Christian Peacemaker Teams (CPT) arose from a call in 1984 for Christians to devote the same discipline and self-sacrifice to nonviolent peacemaking that armies devote to war. Committed to nonviolent alternatives to war, CPT places violence-reduction teams in crisis situations and militarized areas around the world at the invitation of local peace and human rights workers. With a diverse membership of Catholics, Baptists, Presbyterians, Mennonites, Brethren and Quakers, CPT's peacemaking emphasizes creative public witness, nonviolent direct action and protection of human rights.

Grassroots International (GRI) is a human rights and international development organization that promotes global justice through partnerships with social change organizations. GRI works around the world to advance political, economic, and social rights and supports development alternatives through grantmaking, education, and advocacy.

Human Rights Watch (HRW) is one of the world's leading independent organizations dedicated to defending and protecting human rights. HRW stands with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. HRW investigates and exposes human rights violations and holds abusers accountable. HRW challenges governments and non-state actors to end abusive practices and respect international human rights law. HRW currently monitors human rights abuses in over 80 countries.

International Crisis Group (ICG) is an independent, non-profit, non-governmental organization, with approximately 130 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict worldwide. ICG is widely recognized as the world's leading independent, non-partisan source of analysis and advice to governments and intergovernmental bodies on the prevention and resolution of deadly conflict. ICG actively monitors over 60 conflicts and potential conflicts around the globe.

The Institute for Conflict Analysis and Resolution at George Mason University (ICAR) is committed to the development of theory, research, and practice that interrupts cycles of violence. ICAR advances the understanding of deeply rooted conflicts all over the world through research, teaching, practice, and outreach.

The Kroc Institute for International Peace Studies at Notre Dame University is one of the world's principal centers for the study of the causes of violent conflict and strategies for sustainable peace. Faculty conduct research on war, genocide, terrorism, ethnic and religious conflict, and violation of human rights; teach students earning doctoral, masters and bachelor degrees in peace studies; and, contribute to on-the-ground peace-building worldwide through consultation, facilitation and research.

Operation USA helps communities alleviate the effects of disasters, disease and endemic poverty throughout the world by providing privately-funded relief, reconstruction and development aid. Operation USA provides material and financial assistance to grassroots organizations that promote sustainable development, leadership and capacity building, and income generating activities; provides education and health services; and advocates on behalf of vulnerable people.

Peace Appeal Foundation (PAF) supports peace and conflict resolution processes globally through interventions (typically establishing dialogue and negotiations support structures) designed to achieve agreed, fair and just outcomes.

The cornerstone of PAF's work is comprised of direct, sustained mediation, facilitation and advisory services in some of the world's most intractable conflicts. PAF also works collaboratively with local and international partners to develop and disseminate innovative tools, methodologies, educational materials and programs in support of peace and conflict resolution efforts.

SUMMARY OF ARGUMENT

The material support statute's prohibitions on "service," "training," "personnel," and "expert advice or assistance" are unconstitutionally vague as applied to the kind of peaceful, non-violent speech and advocacy in which both plaintiffs and *amici* engage. *Amici*, like plaintiffs, are left hopelessly guessing – at the risk of grave penalty – whether their advocacy for peace or human rights, their engagement in or facilitation of peace-making dialogue, or the expressive components of their humanitarian aid work crosses the line from constitutionally protected to criminally proscribed.

To the extent that the vague terms of the statute do, in fact, proscribe this kind of speech and advocacy, the statute suffers two independently fatal flaws under the First and Fifth Amendments. First, it proscribes speech and advocacy that is intended to further only lawful, non-violent activity – and which in no way incites others to imminent lawless action – merely because the recipient or beneficiary of that speech has been unilaterally designated as a terrorist organization by the Executive Branch. Second, it punishes association with a group even where the association is not intended to further the group's unlawful activities and is, in fact, intended to *dissuade* the group from engaging in unlawful activities.

ARGUMENT

I. THE STATUTE'S PROHIBITIONS ON "SERVICE[S]," "TRAINING," "EXPERT ADVICE AND ASSISTANCE," AND "PERSONNEL" ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO PLAINTIFFS AND THREATEN TO CRIMINALIZE ACTIVITIES THAT ARE PROTECTED BY THE FIRST AMENDMENT

The challenged terms are unconstitutionally vague under the Fifth Amendment.

While vague laws are always suspect, courts harbor the least tolerance for vague laws that carry criminal penalties. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Criminal laws are unconstitutionally vague if they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In other words, a law is unconstitutionally vague if it fails to provide adequate notice of proscribed conduct. *See id.* ("an enactment is void for vagueness if its prohibitions are not clearly defined"); *see also Smith v. Goguen*, 415 U.S. 566, 572 (1974) (the vagueness doctrine "incorporates notions of fair notice or warning"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (a law is vague if it tethers individual liability to "an unasertainable standard," leaving persons "of common intelligence [to] guess at its meaning" (internal quotation marks omitted)). Because "we assume that a [person] is free to steer between lawful and unlawful conduct," he or she has to be given enough clear direction to "act accordingly." *Grayned*, 408 U.S. at 108.

Criminal laws are also unconstitutionally vague if they authorize or encourage "arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999). Laws must "provide explicit standards for those who apply them" in order to avoid the "dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109. They cannot "delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.*; *see also Smith*, 415 U.S. at 575 ("Statutory language [with] standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of criminal law.").

Vague criminal laws are especially problematic where they "abut[ ] upon sensitive areas of basic First Amendment freedoms" and "operate[ ] to inhibit the exercise of (those) freedoms." *Grayned*, 104 U.S. at 109 (internal quotation marks omitted). The vagueness doctrine incorporates a special solicitude for First Amendment concerns because statutes that have uncertain meanings inevitably lead people to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks omitted). Statutes that have uncertain meanings also increase the risk that individuals will be targeted for punishment because of unpopular speech or expression. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). For this reason, a heightened level of clarity is required of criminal statutes that threaten to encroach upon First Amendment-protected activities. *See Smith*, 415 U.S. at 573 ("Where a statute's literal scope . . . is capable of reaching expressions sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.").

In this case, the Court of Appeals correctly held that the criminal prohibitions on "service," "training," and "expert advice or assistance derived from . . . specialized" knowledge are fatally void for vagueness as applied to plaintiffs' intended speech. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928-30 (9th Cir. 2009). The Court of Appeals erred, however, in holding that "expert advice and assistance derived from . . . scientific or technical" knowledge and "personnel" survived vagueness scrutiny. *Id.* at 930-931.

The prohibition on "training" fails to convey to a person of common intelligence which activities are prohibited and which are not. "[T]raining" is defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b). Nothing in the statute explains how to distinguish "instruction designed to impart a specific skill" from instruction bestowing "general knowledge." Nor does common usage illuminate that distinction. Several *amici* here provide teaching and direction in conflict resolution, non-violence, and humanitarian aid. But they cannot meaningfully discern whether the skills or information they impart are general (in which case their conduct would be permitted) or specific (in which case it would not be). *See infra* 12-14, 23.

The phrase "expert advice or assistance" similarly fails to provide meaningful notice of what conduct is prohibited. "[E]xpert advice and assistance" is defined to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). Nothing in the statute provides a firm sense of what that definition encompasses. Not only does the statute fail to give any guidance how to distinguish "technical" knowledge from non-technical knowledge, or how to distinguish knowledge that is "specialized" from knowledge that is general, it is utterly unclear what it means for information to be "derived from" technical or specialized knowledge. The government's interpretation of these terms underscores the problem. For example, the government has asserted that lawyers could be providing "expert advice or assistance" by filing an *amicus* brief in support of a designated organization. *Humanitarian Law Project*, 552 F.3d at 930. *Amici* cannot meaningfully ascertain whether, for example, sharing expertise about international law, conflict resolution strategies, or how to rebuild a village after a natural disaster could constitute unlawful provision of "specialized," "technical," or "scientific" knowledge. *See infra* 13-15, 20-23, 26-27.

The term "service," which is not defined in the material support statute at all, presents similar concerns. The government has interpreted the term to encompass any "act done for the benefit of" a designated group. Petition for Writ of Certiorari at 17, *Holder v. Humanitarian Law Project*, No. 08-1498 (S. Ct. June 4, 2009). This interpretation, however, gives no meaningful notice of the conduct that is proscribed. A substantial amount of *amici's* work could be perceived to be "for the benefit" of designated groups, even though this work encourages peace and non-violence, not terrorism. *See infra* 13-14, 16-18, 23-25.

The prohibition on "personnel" also fails to provide concrete guidance regarding what is prohibited. Provision of "personnel" entails, among other things, "knowingly" providing one or more persons (including oneself) "to work under that terrorist organization's direction or control." 18 U.S.C. § 2339B(h). The definition excludes "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." *Id.* Its sweep is limited only by the elastic concept of working "entirely independently" of a designated group, a concept undefined by the statute.

The vagueness of the challenged terms is especially problematic because the terms can fairly be construed to reach activity that is protected by the First Amendment. Indeed, the challenged terms potentially implicate a great deal of the First Amendment-protected speech and advocacy in which *amici* engage in the course of their peace-building, human rights-promoting, and humanitarian work, whether it be teaching or instruction, *see infra* 12-14; communicating ideas and discussing ways to forge peace, *see infra* 15-18; or advocacy to further human rights, the rule of law, or non-violence, *see infra* 18-25.[2]

A. Teaching And Instruction In Peace-Building Skills

Several of *amici* pursue their humanitarian or peace-building agendas by providing instruction in non-violence. This activity falls comfortably within the First Amendment's zone of protection. *See supra* 12 n.2. Yet the statute fails to supply sufficient clarity in its definitions to allow *amici* to determine whether this activity violates § 2339B.

---

[2] *See generally*, Brief of Respondents/Cross-Petitioners at 23-24, *Holder v. Humanitarian Law Project*, Nos. 08-1498 and 09-89 (filed Nov. 16, 2009); *see also Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (the right of "free speech" and "the right to teach" are "fundamental rights"); *Dennis v. United States*, 341 U.S. 494, 574 (1951) (Goldberg, J., concurring) (the First Amendment protects "teaching" and "advocacy"); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (the First Amendment protects "tutoring"); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 141-42 (1943) (the First Amendment protects one's ability to "communicate ideas"); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (the First Amendment protects "communication of information" and "the advocacy of causes"); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (the First Amendment "protects vigorous advocacy . . . of lawful ends"); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (the "right to free speech . . . includes the right to attempt to persuade others to change their views"); *Griswold v. Connecticut.*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech . . . includes . . . the right to distribute [information], the right to receive [information] . . . and freedom to teach."); *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (the First Amendment protects one's ability to associate for the "advancement of beliefs and ideas").

1. In order to reduce violence around the world, Christian Peacemaker Teams (CPT), places violence-reduction teams in conflict zones. Such teams currently operate in Northern Iraq, Colombia, and the West Bank. These teams provide, among other things, reconciliation and non-violence training at the request of local non-governmental organizations (NGOs). Participants may include individuals who are members of groups that engage in violence. The aim of these trainings is to educate participants about the history of various non-violent social change movements; explain the benefits, effectiveness, and legitimacy of non-violent approaches; teach specific techniques of non-violent resistance and reconciliation; and advise participants on how to put these techniques to concrete use.

It is unclear whether this activity – to the extent that members of any proscribed group might participate – might be construed as prohibited training or expert advice because it is unclear whether CPT is imparting information derived from specialized knowledge or specific skills, or general knowledge. It is also unclear whether this activity might be construed as a prohibited service on the theory that the trainings are done "for the benefit of" the participants.

CPT also occasionally provides non-violence trainings at the request of armed actors themselves.

For example, long before the material support statute existed, the armed wing of Fatah (a faction of the PLO) approached CPT and requested a training, which CPT provided. Like all of CPT's non-violence trainings, the training was intended to convince the group to renounce violence and adopt non-violent resistance techniques instead. It was not intended to further terrorism. Had Fatah been a designated group, however, CPT's activities might have constituted prohibited training, expert advice derived from specialized knowledge, or a service.

2. The Carter Center, among its many activities to resolve and prevent violent conflicts around the world, helps regional organizations build capacity for peaceful conflict resolution. To this end, the Carter Center uses creative means to teach organizations and individuals peaceful conflict resolution techniques. In furtherance of its mission, the Carter Center would like to launch a project to teach peaceful conflict resolution in universities in Gaza through the formation of a student "parliament," where students could come to voice concerns and be trained to adjudicate disputes. The goal would be to make students accustomed to solving disputes through peaceful dialogue rather than violence. Although this activity is plainly intended to end terrorism, not support it, the Carter Center is unsure if it can initiate this program without running afoul of the material support statute, if at least some of the students participating are known or likely to be members of Hamas or other designated FTOs. It is unclear whether the program could be construed as a prohibited service, or

whether some aspects of the program might entail the provision of prohibited training or expert advice derived from specialized knowledge.

B. Conflict Resolution and Mediation

Some *amici* directly engage with parties to violent hostilities in order to peacefully resolve conflicts. These activities implicate important First Amendment concerns, requiring increased clarity of the statute's operative terms. *See supra* 12 n.2. But, again, *amici* must navigate these inherently delicate situations in the face of vague statutory language.

1. For example, the Carter Center, through its Conflict Resolution Program, monitors and mediates conflicts, helps implement peace agreements, strengthens rule of law, and facilitates dialogue to ease tensions. When democracy backslides or diplomacy fails, the Carter Center offers mediation and facilitation expertise for peacemaking in Africa, the Middle East, Latin America, and Asia, and tries to fill the space between official diplomacy and unofficial grassroots peace efforts. This work, by necessity, requires meeting with all sides to a conflict. The Carter Center engages all parties – elected leaders, political party officials, international bodies, diplomats, NGOs, the media, and independent analysts – in its advocacy for peaceful solutions. In the course of resolving or preventing conflicts, Carter Center staff will meet with violent actors – some of whom may be or may in the future be designated as FTOs – to persuade them to cease violent activity and discuss specific paths to peace. Sometimes the Carter Center will directly

mediate between parties to help negotiate a cessation of hostilities. In the course of these meetings, the Carter Center may discuss peace-facilitating strategies. The Carter Center may also advise groups on their obligations under international law. The Carter Center has engaged in this kind of conflict resolution activity with, among others, the PLO, Fatah, Hamas, Hezbollah, the SPLN in Sudan, the Lord's Resistance Army in Uganda, and the Maoists in Nepal. The intent, of course, is to further peace, not terrorism.

It is unclear, however, whether any advice or expertise that may be communicated during these dialogues might be construed as specialized, as opposed to general, advice or assistance. Moreover, it is unclear whether the facilitation of these dialogues, or even the dialogues themselves, might be construed as a prohibited service to the extent that this activity is done at least in part for the benefit of the parties to a conflict. The statute gives no guidance on structuring this peace-promoting activity in a way that steers clear of criminal sanction.

2. Similarly, Peace Appeal Foundation (PAF) engages with all parties to violent conflicts to help them design and implement dialogue and negotiation support structures that underlie peacemaking efforts. PAF also conducts research; analyzes the parties' positions and areas of common ground; and then makes that information available to all parties – sometimes through collaborative, but confidential, computer networks – in order to equip stakeholders with information necessary to engage in

meaningful dialogue. PAF has found that providing this kind of platform for dialogue is a critical element of establishing relationships and building trust among antagonists for the purpose of ending violence.

PAF has engaged in this kind of work where parties to a conflict include groups that have been or may in the future be designated as FTOs. For example, in Sri Lanka PAF established a confidential dialogue process called the One Text Initiative (which was supported by funding from USAID), through which all parties to the violence in Sri Lanka communicated. When the LTTE (otherwise known as the Tamil Tigers) assigned a proxy representative to participate in the One Text Initiative, however, U.S. support for the process was called into question and ultimately withdrawn, dealing a severe blow to the effectiveness of the talks among all parties. PAF and its partners were forced to restructure their activities due to fear of potential liability under the material support statute. In Nepal, PAF helped establish the Nepal Transitions to Peace Initiative, which involved creating a physical space where stakeholders from Nepal's political parties meet regularly in support of the peace process to resolve Nepal's violent conflict. This initiative required PAF to engage directly with the CPN-Maoists. The Maoists' participation was vital; because they controlled half of Nepal's territory, no peace-building initiative could have plausibly succeeded if they were excluded.

These activities are solely intended to promote peace, not terrorism. However, it is unclear whether equipping parties to violent conflicts with tools to facilitate peace, or providing them with advice and technical assistance to this end, might be construed as prohibited services or expert advice or assistance derived from specialized or technical knowledge.

3. CPT also occasionally serves as a mediator in violent conflicts. For example, in 1990, CPT provided assistance to members of the Mohawk nation during the "Oka Crisis." Oka is a town in Quebec, Canada. What began as a peaceful protest of plans to expand a golf course on land the Mohawks considered sacred soon escalated into a months-long, occasionally violent standoff between Mohawk protesters, some armed, and Canadian police and soldiers. At the request of the Mohawk protesters, CPT went behind the lines to mediate a peaceful solution. CPT's aim was to help bring the standoff to a speedy and peaceful end. Had CPT provides these same mediation services to a designated organization, however, it is unclear whether these activities would constitute a prohibited service, or expert advice or assistance derived from specialized knowledge.

C. Advocacy Directed at Violent Actors

Some *amici* engage in human rights, rule of law, and peace advocacy activities directed specifically towards violent actors. This advocacy aims to persuade groups to cease human rights violations, comply with international laws, reject violence, and pursue their ends through peaceful and legal means. Nothing implicates the First Amendment more directly than advocacy. *See supra*

12 n.2. Section 2339B's vague terms, however, leave *amici* foundering to determine whether their advocacy activities are permissible.

1. The Carter Center, for example, engages in democracy and election-related advocacy, sometimes with groups that engage in violence but also hold considerable, and formal, political power. Through its Democracy Program, the Carter Center has conducted election monitoring in 30 countries, with the consent or at the request of all major parties to an election. Before an election, Carter Center teams monitor the registration and campaign process, meet with elected officials and party leaders to discuss any problems, and advise officials how to ensure fair and impartial electoral procedures; occasionally, the Carter Center will mediate election disputes. On election day, Carter Center observers track every stage of the process from the opening of polling places to ballot counting; throughout the day, observers will speak with polling site officials and citizens who have encountered problems. Where irregularities occur, Carter Center teams continue their dialogue with government and party officials to advise them about potential improvements for future elections, mediate any remaining disputes, and, where applicable, help facilitate the peaceful transfer of power. In 2009, Carter Center teams observed elections in Lebanon. In 1996, 2005, and 2006, Carter Center teams observed elections in the Palestinian Territories. In both Lebanon and the Palestinian Territories, President Carter himself led the observation missions. In the course of their election monitoring activities, observer teams will

occasionally meet with members of Hezbollah's or Hamas' political wing – both of which have members who are elected representatives and, thus, participate directly in the electoral process.

This advocacy and advising activity is intended to ensure fair elections that represent the true will of the people. It is unclear, however, whether this activity might be construed as prohibited expert advice derived from specialized or technical knowledge.

2. Human Rights Watch (HRW) investigates human rights abuses in the field, documents its findings in human rights reports, and advocates with the perpetrators of those abuses to cease their unlawful actions. HRW also advises governments and non-state actors on their legal obligations under international law, and lobbies them to comply with those obligations. Over the years, HRW has put considerable effort into documenting human rights violations committed by militant groups, some of which have been designated as terrorist organizations by the United States. For example, HRW has extensively documented human rights violations committed by the FARC, ELN, Hamas, Hezbollah, and the LTTE.[3] As part of their advocacy,

---

[3] *See, e.g.*, Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (Dec. 2008); Human Rights Watch, *Civilians under Assault Hezbollah's Rocket Attacks on Israel in the 2006 War* (Aug. 2007); Human Rights Watch, *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka* (Nov. 2004); Human Rights Watch, *"You'll Learn Not To Cry": Child Combatants in Colombia* (Sept. 2003); Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians* (Oct. 2002); Human Rights

HRW staff members have met with senior officials of these groups about their human rights violations. In meetings like this, in addition to urging the groups to cease their abusive practices, HRW may also educate them on their specific obligations under international human rights and humanitarian law and advise them on the particular steps the groups must take to bring their actions into compliance with the law.

All of this activity, of course, is intended to further human rights, not terrorism. It is unclear, however, whether any aspect of the communication of practical advice or legal expertise that occurs in these kinds of meetings might be construed as prohibited expert advice derived from specialized knowledge. The statute fails to provide any guidance whether sharing expertise on international human rights law might be construed as specialized knowledge (which is prohibited) or general knowledge (which is permitted).

3. International Crisis Group (ICG), as part of its conflict analysis, prevention, and resolution work, also engages in advocacy with both violent non-state actors and governments engaged in or supporting violent hostilities. ICG issues detailed analyses of existing or emerging conflicts, and makes specific recommendations that non-state actors or governments should adopt to prevent further violence. ICG may then meet with the relevant parties to urge them to adopt ICG's recommended actions. In the course of such meetings, ICG might

---

Watch, *Beyond Negotiation: International Humanitarian Law and its Application to the Conduct of the FARC-EP* (Aug. 2001).

explain to the participants their obligations under international law or international agreements, and might provide advice as to how participants can adopt ICG's recommendations in practice.

This kind of advocacy and dialogue is intended to further peace and compliance with international law, not terrorism. If it were to occur with a group that is or may in the future be designated, however, it is unclear whether some aspects of this crisis resolution activity might be construed as prohibited expert advice derived from specialized knowledge.

4. Similarly, the Carter Center, as part of its human rights monitoring activity in conflict zones, engages in advocacy meetings with political leaders of, among other groups, Hamas and Hezbollah. Like HRW, the Carter Center advocates for the cessation of human rights abuses, and may, in the process, share its expertise on international law and suggest ways to comply with the law. This advocacy is intended to further human rights, not terrorism. Again, it is unclear, however, whether the aspects of this advocacy that involve the sharing of knowledge and expertise might be construed as prohibited expert advice derived from specialized knowledge.

5. In its efforts to advocate for peaceful resolution of the Israeli/Palestinian conflict, and as part of its work in the West Bank, CPT often meets with local town councils and local government officials, and attends town meetings, to discuss the benefits of non-violence and advise on ending the conflict. CPT also arranges for delegations of non-violent peace groups from around the world to visit

the West Bank; occasionally, these delegations meet with local officials. Some of the elected officials with whom CPT and its delegations meet are members of Hamas' political wing.

These meetings are intended to advocate for peace, not to further terrorism. It is unclear, however, whether any of this advocacy might be construed as expert advice derived from specialized knowledge or whether having delegations meet with these officials might be construed as a prohibited service.

6. CPT also engages armed actors in one-on-one efforts to convince them to renounce violence. When CPT staff encounters individuals on the street, in villages, or on the farms they visit as they travel throughout Colombia, Iraq, or the West Bank, and when they believe an individual might be affiliated with paramilitaries, civilian armed militias, or a rebel group, CPT staff discuss the benefits of nonviolence and advise them to cease their violent activities and to stop threatening local populations.

This personalized, face-to-face advocacy is intended to promote peace, not terrorism. To the extent that any of these individuals are known or suspected to be members of proscribed groups, however, it is unclear whether CPT's provision of advice and teaching could be perceived as constituting prohibited expert advice, training, or a service.

D. Independent Advocacy That Could Be Perceived as "For the Benefit of" Others

Some *amici* also engage in advocacy activities that might be construed as providing a "service," insofar as the activities could be perceived as done "for the benefit of" a designated group or its members.

1. Christian Peacemaker teams in Iraq, for example, engaged in significant advocacy on behalf of individuals detained by the U.S. government at Abu Ghraib prison in the early years of the Iraq war. At the request of family members of individuals whose loved ones had disappeared, presumably into U.S. custody, CPT routinely sought information about prisoners' whereabouts from the Iraqi Assistance Center, and lodged complaints about abuse of particular prisoners. Some of the detainees on whose behalf CPT advocated may have been members of designated groups.

CPT's advocacy was intended to promote and enforce the rule of law, not terrorism. It is unclear, however, whether CPT's advocacy on behalf of particular individuals could have been construed as a prohibited service or the prohibited provision of personnel.

2. CPT also engages in extensive advocacy to call attention to the plight of civilian victims of a violent conflict between Turkey and Kurdish separatists who reside in Northern Iraq. In the course of that work, CPT visits refugee camps to discuss with refugees, some of whom reside in what are unofficially considered "PKK" camps, non-violent

ways to end the conflict. CPT will sometimes help call attention to non-violent protest activities in the region. For example, CPT recently called attention to a peaceful march planned by Kurdish refugees. The march reportedly included some members or supporters of the PKK. The group marched from the refugee camp in Iraq to the Turkish border and offered peace to the Turkish government. In its advocacy, CPT has also called attention to a recent and under-reported PKK cease-fire. Although CPT is engaged in independent advocacy, it is unclear whether some of this activity could be wrongly perceived as prohibited service done "for the benefit of" the PKK.

3. Similarly, the Carter Center, in its advocacy efforts to achieve peace between Palestinians and Israelis, publicly calls for inclusion of Hamas in peace talks because Hamas represents a sizeable portion of the population and the Carter Center believes that true peace is not achievable without their active participation. The Carter Center's advocacy in this regard is intended to ensure an effective peace process and is wholly independent of Hamas. Nonetheless, it is unclear whether even this type of advocacy could be viewed as a prohibited service because it could be construed as action taken "for the benefit of" Hamas as Hamas would presumably derive some benefit from inclusion in the peace process.

E. Humanitarian Aid

Provision of humanitarian aid often requires working with and providing expert advice and technical assistance to local actors. Each of the *amici* that provide humanitarian aid adhere strictly to certain universal principles of humanitarian assistance. These principles require all providers of aid to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not. However, in the context of war zones, particularly in geographic areas controlled or dominated by designated groups, some form of engagement with these groups, their members, or their supporters is sometimes inevitable. When *amici* provide instruction or guidance to local groups to further humanitarian aid operations, they engage in First Amendment-protected activity. *See supra* 12 n.2. The challenged provisions of § 2339B, however, do not clearly delineate the space available for *amici* to conduct on-the-ground humanitarian aid activities.

1. For example, Operation USA engaged in significant disaster relief and rebuilding efforts in Sri Lanka after a tsunami devastated wide swaths of the country in 2004. The north and east of the country – Tamil areas largely controlled by the rebel group LTTE until their defeat in May 2009 – were particularly affected. Operation USA partnered with local NGOs to rebuild Kallady, a fishing village on the east coast of Sri Lanka where homes and infrastructure had been entirely destroyed by the tsunami. By 2006, Operation USA had completed its work overseeing the rebuilding of 163 homes, a health center, a community center, a primary school, and a pre-school. As a part of this work, Operation USA provided significant amounts of advice and assistance to local actors regarding reconstruction

plans and the rebuilding process itself, including technical medical, water, sanitation, hydrology, and education expertise.

One of Operation USA's many local partners was a local Tamil relief organization that had been granted legal status (and even given awards) by the Sri Lankan government. In 2007 (long after Operation USA's work in Kallady was completed), however, a new Sri Lankan administration decided the relief organization was affiliated with the LTTE and shut it down. The U.S. Treasury Department subsequently designated the organization. Operation USA no longer works with this particular organization, which is now defunct.

None of Operation U.S.A.'s provision of advice or technical assistance was in any way intended to support terrorism or violence perpetrated by the LTTE; it was intended to alleviate the suffering of Tamil civilians. Had the Tamil relief organization been designated at the time, however, it is unclear whether the kind of expert and technical rebuilding assistance Operation USA provided might be construed as prohibited expert advice or assistance derived from specialized, technical, or even scientific knowledge, or might be construed as a prohibited service or training.

2. Others working in Sri Lanka following the tsunami faced even more acute dilemmas. A huge number of tsunami victims lived in territory then controlled by the LTTE. A number of doctors and public health professionals who went to Sri Lanka in the immediate aftermath of the crisis had to decide whether providing critical public health

information to the people running the refugee camps would be illegal if the recipients of that information were LTTE medical officials. As a result of the material support laws, some doctors who would otherwise have provided such assistance were deterred from doing so. *See* Gady A. Epstein, *Maryland MD Struggles for Tamil Patients*, Balt. Sun, Jan. 23, 2005; Ahilan T. Arulanantham, *Testimony at Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary* (May 10, 2005).[4]

None of the work described above was intended – in any conceivable way – to further terrorism. It is intended to reduce it or end it altogether. Nonetheless, plaintiffs, *amici*, and others who engage in similar missions are left guessing which aspects of their work remain permissible and which may be prohibited. Especially where a criminal statute potentially reaches clearly established First Amendment interests, the Constitution does not permit such profound uncertainty. The potential impact of the statute on *amici* reinforces plaintiffs' central claim that the challenged provisions of § 2339B are unconstitutionally vague as applied to plaintiffs' humanitarian activities.

---

[4] The transcript is available at http://www.aclu.org/national-security/aclu-testimony-material-support-terrorism-laws-section-805-patriot-act-and-section.

II. TO THE EXTENT THAT THE STATUTE DOES PUNISH SPEECH AND ADVOCACY INTENDED TO FURTHER LAWFUL ACTIVITY, THE STATUTE VIOLATES THE FIRST AMENDMENT

To the extent that the vague terms in § 2339B apply to the kinds of First Amendment-protected activities engaged in by groups like *amici* or plaintiffs, those provisions violate the First Amendment. As construed by the government, the material support statute proscribes speech that is intended to further only lawful, non-violent activity. It also impermissibly punishes association intended to dissuade an organization from engaging in unlawful activity. It is axiomatic, however, that the government cannot sanction advocacy unless it incites imminent lawless activity. Likewise, well-established First and Fifth Amendment principles prohibit the government from punishing association with a group that engages in illegal activity unless the association is intended to further the group's illegal aims. The material support statute, as construed by the government, offends both of these principles. In doing so, it threatens the speech and association of internationally recognized organizations whose mission is to promote peace and humanitarian ends rather than violence.[5]

---

[5] *Amici* also agree with plaintiffs that the challenged provisions violate the First Amendment to the extent that they impose a complete ban on pure political speech and discriminate on the basis of the content of speech without being narrowly tailored to a compelling government interest.

A. The Government May Not Punish Speech Based On Fear Of A Third-Party's Potential Unlawful Conduct Unless The Speaker Intends To Incite Imminent Unlawful Conduct

Amici's humanitarian, human rights, and peace-promoting work is quintessential speech and advocacy for First Amendment purposes. *See supra* at 12 n.2. There is no question that the First Amendment protects "vigorous advocacy," *NAACP v. Button*, 371 U.S. 415, 429 (1963), as well as the free discussion of "public questions," *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964).

The First Amendment generally does not permit the government to punish otherwise protected speech solely because it wants to punish or deter conduct by the *listener* or *recipient* of speech. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . [I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001); *see also Cox v. State of La.* 379 U.S. 536, 550-51 (1965) (rejecting notion that peaceful protest activity could be prohibited for fear it would provoke violence from others).

Indeed, the First Amendment sets a very high bar for restrictions on speech based solely on fear of illegal activity perpetrated by the *recipients* of speech. Even where the speaker himself advocates violent or unlawful conduct, the Court has held that speech may not be suppressed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *cf. Virginia v. Black*, 538 U.S. 343, 363 (2003) (upholding Virginia cross-burning regulation because it is a "form of intimidation" that tends to signal "impending violence" but striking down provision creating presumption that cross-burning is intended to promote violence). Thus, even speech that is *supportive* of violent or illegal action is fully protected – and cannot be proscribed – unless it reaches the line of incitement.

Here, by contrast, *amici* – like plaintiffs – face the threat of prosecution for engaging in speech designed to *counteract* violence. As described above, *amici's* work includes human rights advocacy, *see supra* 18-25; promotion and facilitation of democratic practices, *see supra* 18; direct intervention aimed at resolution of violent conflicts, *see supra* 12-18; and expressive activity that furthers the provision of humanitarian aid, *see supra* 26-27. Such activities lie far beyond the narrow bounds of proscribable speech contemplated in *Brandenburg*. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) ("[when an advocate's] appeals do not incite lawless action, they must be regarded as protected speech").

There is no question that *amici's* peaceful speech and advocacy could not be proscribed if it were directed at Congress, *The New York Times* editorial board, or another human rights or peace group. The only thing that distinguishes *amici's* otherwise protected speech is that it is provided to or directed at groups that may engage in unlawful conduct. But this alone does not render the speech unprotected. If a U.S. human rights organization issues a report that documents the LTTE's use of child soldiers, condemns the practice, lists a set of concrete recommendations it believes the LTTE should adopt to cease the abuse, and provides specific advice as to how the LTTE should implement the recommendations in practice, there is surely no doubt that this activity is fully protected by the First Amendment. The mere fact that it is communicated to the LTTE (an entity engaged in some illegal conduct) rather than *The New York Times* editorial board cannot remove this kind of peaceful speech and advocacy from constitutional protection.

Nor does constitutional protection vanish simply because *amici* choose to engage violent actors directly in face-to-face discussion rather than advocate from afar through the written word. It makes no difference – as a First Amendment matter – whether the human rights group described above presents its advocacy in person or in writing. *See City of Struthers*, 319 U.S. at 141-42 (recognizing "freedom to distribute information" and advocate through variety of means, including face-to-face, at meetings, or through leaflets); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) (same); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (myriad forms of advocacy "to persuade to action" protected by the First Amendment); *see also De Jonge v. State of Or.*, 299 U.S. 353 (1937) (finding, in the context of

Communist Party meetings, that "[t]he holding of meetings for peaceable political action cannot be proscribed" and "[t]hose who assist in the conduct of such meetings cannot be branded as criminals on that score").

If the government is concerned that speech directed at terrorist organizations will incite them (or others) to imminent lawless action, or if the government fears a speaker is conspiring to commit crime, it can punish that speech. The material support statute, however, sweeps much more broadly. It impermissibly suppresses speech that not only falls far short of incitement but is actually aimed at promoting peace and human rights, based solely on the fact that the *recipient* may engage in unlawful conduct unrelated to the speech provided. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253-254 (2002) (striking down ban on virtual child pornography, because the statute did not punish "attempt, incitement, solicitation, or conspiracy" and holding that the government could not "prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct"). As construed by the government, the broad sweep of § 2339B thus "impermissibly intrudes upon the freedoms guaranteed by the First Amendment." *Brandenburg*, 395 U.S. at 448.

B. This Constitutional Violation Cannot Be Cured Simply By Making It Contingent On Association With A Designated Group

Implicit in the government's arguments below was the proposition that expressive activity that would otherwise be protected by the First Amendment becomes unprotected when engaged in with a group that the executive branch has designated. Under this Court's well-established precedents, however, association with a group that engages in unlawful activity cannot be punished unless it is intended to further the group's unlawful aims. Hinging application of the statute on a disfavored association only compounds the constitutional problem by layering an impermissible restriction on the right to association upon an impermissible restriction on speech. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920.[6]

The material support statute, however, punishes speech "by reason of association alone," whether or not it is intended to further a designated group's unlawful aims. Indeed, it subjects speakers to severe criminal penalties even if they vehemently oppose the group's unlawful ends and speak and associate with the group in order to convince it to cease its illegal activities. While the Constitution does not immunize direct participation in violence, "it is a different matter" when, instead of prosecuting that violence directly, the government "seizes upon mere participation in a . . . lawful . . . discussion as the basis for a criminal charge." *De Jonge*, 299 U.S. at 365; *See also Healy v. James*, 408 U.S. 169, 185-86 (1972). By "establish[ing] guilt by association alone," without any need to show an intent to further an FTO's unlawful conduct, § 2339B impermissibly imposes "[an] inhibiting effect on the exercise of First Amendment rights." *United States v. Robel*, 389 U.S. 258, 265 (1967).

---

[6] This principle has dual constitutional origins. In addition to the associational freedoms protected by the First Amendment, the Fifth Amendment's guarantee of due process mandates that, in criminal law, "guilt is personal," and that association with a group engaging in unlawful conduct may impute criminal liability only when an individual possesses "a guilty knowledge and intent," but not on the basis of "merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." *Scales v. United States*, 367 U.S. 203, 224, 228 (1961). *Amici* agree with plaintiffs that the material support statute violates the Fifth Amendment personal guilt requirement as well.

The Court's opinion in *Claiborne Hardware* provides useful guidance. In that case, the Mississippi Supreme Court had held jointly and severally liable the NAACP and several dozen individuals who had supported a boycott designed to combat pervasive racial discrimination, because some small number of boycott-supporters had engaged in violence. *Claiborne Hardware*, 458 U.S. at 889-96. In reversing that decision, the Court found that the imposition of such blanket liability infringed upon the right to associate guaranteed by the Constitution. The Court's analysis proceeded from the premise that the boycott was composed mainly of "speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907. Measured against those core constitutional freedoms, the state's authority to regulate the economic sphere – though far from trivial – could not justify suppression of the nonviolent, First Amendment-protected elements of the boycott. *Id.* at 914-915. The Court explained that, while nothing prevented a state from using tort liability to combat business losses caused by violence, "[w]hen such conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id.* at 916 (quoting *NAACP*, 371 U.S. at 438). To satisfy that demand, the Court ruled, a showing of specific intent to further violence is a necessary ingredient of liability predicated on association with a group which includes some members engaged in violent acts. *Id.* at 920.

Amici and plaintiffs, like the majority of boycotters in *Claiborne Hardware*, pursue their objectives through nonviolent advocacy and expression lying at the core of the First Amendment's domain. Just as the boycotters in *Claiborne Hardware* faced massive liability for engaging in protected conduct deemed tainted by the violent conduct of third parties, *amici* and plaintiffs face the risk of serious criminal liability for engaging in otherwise protected, non-violent, First Amendment activity with groups that may be engaged in violence. And just as the boycotters set out to employ protected First Amendment freedoms in the service of social justice – "[t]hrough speech, assembly, and petition – rather than through riot or revolution," *id.* at 912 – *amici* and plaintiffs try to achieve change by fostering peace, furthering human rights, and alleviating human suffering.

Amici do not question the government's compelling interest in combating terrorism, or its interest in stemming support that furthers unlawful, violent acts. But the Constitution requires a "precision of regulation" in pursuing that mission: the government must distinguish between confederates of criminal groups who seek to facilitate the group's unlawful aims, and individuals whose legitimate First Amendment expression and advocacy brings them into association with designated groups. To the extent that § 2339B would collapse that distinction, it cannot withstand constitutional scrutiny. While national security is undoubtedly a compelling state interest, the government has not shown that criminalizing pure political speech advocating peaceful, lawful aims is necessary to further that interest.

CONCLUSION

For the reasons stated above, the Court should affirm the court of appeals' judgment with respect to the provisions it held unconstitutionally vague as applied to plaintiffs' speech and reverse the court's judgment with respect to the provisions it upheld.

Respectfully submitted,

Melissa Goodman
Counsel of Record
Steven R. Shapiro
Jameel Jaffer
Laurence M. Schwartztol
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

AMICUS
CURIAE
BRIEF

Nos. 08-1498 & 09-89

In the

Supreme Court of the United States

ERIC HOLDER, ATTORNEY GENERAL, ET AL.,

Petitioners/Cross-Respondents,

v.

HUMANITARIAN LAW PROJECT, ET AL.,

Respondents/Cross-Petitioners.

On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND CENTER FOR LAW AND COUNTERTERRORISM IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

HON. EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, DC 20002

ANDREW C. MCCARTHY
233 Pennsylvania Ave., SE
3rd Floor
Washington, DC 20003

DAVID B. RIVKIN, JR.
Baker Hostetler
1050 Washington Square
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036

JOHN C. EASTMAN
Counsel of Record
JOHN C. YOO
KAREN J. LUGO
RYAN T. DARBY
Center for Constitut'l
Jurisprudence
c/o Chapman Univ.
School of Law
One University Drive
Orange, CA 92886
(714) 628-2500

Counsel for Amici Curiae
Center for Constitutional Jurisprudence
and Center for Law and Counterterrorism

(additional counsel listed on inside cover)

CASEY J. MCTIGUE
Severson & Werson, P.C.
One Embarcadero Center
Suite 2600
San Francisco, CA 94111

MICHELLE J. CONTOIS
800 S. Victoria Ave.
Suite 314
Ventura, CA 93009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

I. THE FRAMERS RECOGNIZED THAT THE NATIONAL GOVERNMENT'S PRIMARY DUTY IS THE PROTECTION OF THE NATION'S SECURITY 3

II. DURING WARTIME THE FEDERAL GOVERNMENT CAN PROHIBIT THE OPERATION OF GROUPS HOSTILE TO THE UNITED STATES OR ITS ALLIES 10

  A. Government May Use Its Power Not Only to Prohibit Terrorist Operations But to Prohibit Support for Any Activities of The Terrorist Organizations 15

    1. Permitting Support for FTO Activities Labeled "Charity" Creates an Absurd, Unwarranted Exception. 17

    2. Charitable Donations Are A Mainstay of Terrorist Financing 21

III. SECTION 2339B DOES NOT UNCONSTITUTIONALLY INFRINGE UPON PROTECTED SPEECH 27

  A. The Material Support Statute Regulates Conduct, Not Speech, and Incidental Restrictions on Speech Do Not Trigger First Amendment Scrutiny 28

  B. If The Court Finds Speech Rights Are Implicated, The *O'Brien* Intermediate Scrutiny Standard Is Still Satisfied 31

  C. The Material Support Statute Survives Even Strict Scrutiny, as National Security is the Utmost Compelling Interest and The Statute is Narrowly Tailored to Protect The Nation from International Terrorism 33

    1. Preventing Aid to Terrorists Is A Compelling Government Interest 34

    2. The "Narrowly Tailored" Prong Must Be Applied in The Context of the Unpredictable and Dangerous Realm of Foreign Affairs..35

    3. Preventing All Aid, Support, or Assistance to Terrorist Groups is an Appropriate Response to a Terrorist Threat 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

AT&T Corp. v. Hulteen,
129 S. Ct. 1962 (2009) 27

American Civil Liberties Union v. National Security Agency,
493 F.3d 644 (6th Cir. 2007) 1

Boumediene v. Bush,
128 S. Ct. 2229 (2008) 12, 13

Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 13, 14

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 32

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 34

Farbwerke Vormals Meister Lucius & Bruning v. Chemical Foundation, Inc.,
283 U.S. 152 (1931) 20

Ft. Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989) 37

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 27

Gilligan v. Morgan,
413 U.S. 1 (1973) 14

Haig v. Agee,
453 U.S. 280 (1981) 30, 33

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 1, 10

Holy Land Foundation for Relief and Development v. Ashcroft,
333 F.3d 156 (D.C. Cir 2003)........................16

Humanitarian Law Project v. Reno,
9 F. Supp. 2d 1176 (C.D. Cal. 1998)...............15

Humanitarian Law Project v. Reno,
205 F.3d 1130 (9th Cir. 2000)...................15, 37

Near v. Minnesota,
283 U.S. 697 (1931)..36

Prize Cases,
67 U.S. 635 (1863)..12

Ex parte Quirin,
317 U.S. 1 (1942)..11

Regan v. Wald,
468 U.S. 222 (1984)..................................13, 19

Rostker v. Goldberg,
453 U.S. 57 (1981).......................29, 32, 33, 36

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006)................................*passim*

Scales v. United States,
367 U.S. 203 (1961)..30

Schenck v. United States,
249 U.S. 47...34, 36

Silesian-American Corp. v. Clark,
332 U.S. 469 (1947)..19

Steward v. Kahn,
78 U.S. 493 (1870)..11

Stoehr v. Wallace,
255 U.S. 239 (1921) 26

Uebersee Finanz-Korporation, A. G. v. McGrath,
343 U.S. 205 (1952) 27

United States v. Abdulqader,
2009 U.S. Dist. LEXIS 25011
(N.D. Tex. Mar. 26, 2009) 17

United States v. Albertini,
472 U.S. 675 (1985) 33, 35

United States v. Brown,
333 U.S. 18 (1948) 17

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 12, 13

United States v. Holy Land Found. for Relief & Dev.,
2007 WL 1452489 (Aug. 2002) 22, 23

United States v. Hossein Kalani Afshari,
2009 U.S. Dist. LEXIS 33887 (C.D. Cal.
Apr. 14, 2009) 16

United States v. Lindh,
212 F. Supp 2d 541 (E.D.Va. 2002) 32, 33

United States v. O'Brien,
391 U.S. 367 (1968) .... *passim*

United States v. Progressive, Inc.,
467 F. Supp. 990 (W.D. Wis. 1979) 37

United States v. Taleb-Jedi,
566 F.Supp.2d 157 (2008) 29

United States v. Turkette,
452 U.S. 576 (1981) 17

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 37

Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (WD Pa. 1974) 26

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 11

Statutes

18 U.S.C. § 1189 .... 15, 19

22 U.S.C. § 2656f 25

Antiterrorism and Effective Death Penalty Act of 1996, § 301, 18 U.S.C. § 2339B *note* (1996) .... *passim*

Authorized Use of Military Force, Pub. L. No. 107-40 (2001) ("AUMF") 1, 20

Other Authorities

153 CONG. REC. S15876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl) 16, 23

Anahad O'Connor and Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, NEW YORK TIMES (Dec. 25, 2009) 3

ABUZA, ZACHARY, NBR ANALYSIS, *Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiyah*, Vol. 14, No. 5, at 7-8 (December 2003) 20, 21

BRUCE HOFFMAN, INSIDE TERRORISM 3-15 (Columbia University Press 2005).......... 18, 23, 26

Counterterrorism, FBI, to R. Richard Newcomb, Director of the office of Foreign Assets Control, "Holy Land Foundation for Relief and Development, International Economic Emergency Powers Act, Action Memorandum," U.S. Department of the Treasury 16-18, 27 (Nov. 5, 2001).. 23, 25

Department of Defense, Dictionary of Military and Associated Terms 550 (Aug. 19, 2009) at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf 26

Extraterritorial Reach of Writ of Habeas Corpus, 122 HARV. L. REV. 395 (2008) 13

Financial Action Task Force, *Terrorist Financing* (Feb. 29, 2008), *available at* http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf 19, 21

FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3 (SR Books 1986) (1973) 4, 8, 9

GEORGE WASHINGTON, LETTER FROM THE CONSTITUTIONAL CONVENTION TO THE PRESIDENT OF THE CONGRESS (September 17, 1787) *reprinted in* 2 DEBATE ON

The Constitution 937 (Library of America 1993) 6, 7

Home-Grown Bombers, The Economist (October 1, 2009), *at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=14561049 2

H.R. Rep. No. 104-383 (1995) 17, 19, 32

James Madison, Notes of Debates in the Federal Convention of 1787 (Tuesday, May 29) (W.W. Norton & Co. ed. 1987) 4

John Adams, Speech to Both Houses of Congress, (November 22, 1797) *reprinted in* 9 The Works of John Adams (Little Brown & Co. 1854) 5, 6

John Jay to the President of Congress (October 13, 1785) *reprinted in* 3 The Correspondence and Public Papers of John Jay 1782-1793, *at* 171 (Henry P. Johnston, ed. 1891) 9

John Locke, Two Treatises of Government 355-56 (Peter Laslett ed., 1988) 4

Joseph Story, 2 Commentaries on the Constitution, 98 (Melville M. Bigelow ed., 1891) 6, 7

Joseph Story, A Familiar Exposition of The Constitution of the United States

215 (Regnery Gateway, Inc. 1986) (1859) 11

MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD, 6 (Yale University Press 2006) 21, 22

Memorandum from Dale Watson, Assistant Director for Counterterrorism, FBI, to R. Richard Newcomb, Director of the office of Foreign Assets Control, "*Holy Land Foundation for Relief and Development, International Economic Emergency Powers Act, Action Memorandum*," U.S. Department of the Treasury 16-18, 27 (Nov. 5, 2001) *available at* http://fletcher.tufts.edu/forum/archives/pdfs/27-1pdfs/Levitt3.pdf 25

Michael B. Farrell, *Alavi Foundation Complaint Comes at Delicate Time for US, Iran*, CHRISTIAN SCIENCE MONITOR (Nov. 12, 2009), at www.cxmonitor.com/2009/1113/ po2s17-usfp.html 17

Press Release, U.S. Dep't. of the Treas., Treasury Department Statement Regarding the Designation of the Global Relief Foundation PO-3553 (Oct. 18, 2002) 23

Progress Since 9/11: The Effectiveness of the U.S. Anti-Terrorist Financing Efforts: Hearing before the House Comm. on Financial Services, Subcomm. on Over-

sight and Investigations, Serial No. 108-10 at 30, 73 (March 11, 2003) (Statement of Steven Emerson, Director, The Investigative Project) 25, 26

S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001) 20

Statement, Department of State, Office of the Coordinator for Counterterrorism, available at http://www.state.gov/s/ct/enemy/index.htm (last visited December 22, 2009) 34

THE FEDERALIST NO. 23 (Alexander Hamilton) 4, 5

THE FEDERALIST NO. 26 (Alexander Hamilton) 7

THE FEDERALIST NO. 34 (Alexander Hamilton) 5

THE FEDERALIST NO. 78 (Alexander Hamilton) 10

THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE (Appleton-Century-Crofts 1955) 8, 9

THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 86-87 (Little Brown & Co. 2001) (1880) 7

THOMAS JEFFERSON AND JOHN ADAMS TO JOHN JAY (March 28, 1786) *reprinted in* THOMAS JEFFERSON TRAVELS: SELECTED WRITINGS 1784-1789, at 104-05 (Anthony Brandt, ed. 2006) 8

Transcript of Trial at Vol. 11, 67-68, *United States v. Holy Land Found for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P) 24

Transcript of Trial at Vol. 15, 103:13—04:2, *United States v. Holy Land Found. for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P) 23, 24

U.S. Gen. Accounting Office, Report to Congressional Requesters: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms, GAO-04-163, 14 (2003) at http://www.nbr.org/publications/ analysis/ pdf/ vol14no5.pdf 18, 21, 22

United Nations Counter-Terrorism Implementation Task Force, *Working Group Report: Tackling the Financing of Terrorism* (October 2009) 20

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that one of the foremost duties of the federal government is to protect the nation's security in time of war. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance to this case, Institute scholars have written extensively on national security matters and the constitutional intersection of national security and civil liberties including amicus curiae briefs in the cases of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007).

The Center for Law & Counterterrorism is a joint project of the Foundation for Defense of Democracy and the National Review Institute, focusing on counterterrorism and American national security. Co-Chairman Andrew C. McCarthy was a federal prosecutor for 18 years at the U.S. Attorney's Office for the Southern District of New York and worked on several terrorism/national security investigations.

---

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

On September 11, 2001, Al Qaeda terrorists killed 2,796 civilians, obliterated the twin World Trade Center towers, attacked the Pentagon, and attempted to destroy either the U.S. Capitol or White House. President Bush declared that the attacks triggered a state of war with Al Qaeda, and Congress followed with an Authorization to use all "necessary and appropriate force" against those whom the President determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored said persons, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2]

America remains at war today. The terrorist enemy remains unvanquished, though thankfully more than twenty-three attempted attacks by it inside the United States since 9/11 have been thwarted.[3] Congress enacted sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and amended them in 2004, the Intelligence Reform and Terrorism Prevention Act ("IRTPA"), 18 U.S.C.

---

[2] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

[3] *Home-Grown Bombers,* THE ECONOMIST (October 1, 2009), *at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=14561049.

§ 2339B(a) and 8 U.S.C. § 1189(a)(1), to prohibit any kind of support for named Foreign Terrorist Organizations ("FTOs"), even when individuals or groups contribute to ostensibly non-violent functions.

By finding the material support statute impermissibly vague, the court below invalidated an Act of Congress, undermined the government's power to conduct war, and significantly restricted congressional power to prohibit aid to the enemy.

ARGUMENT

I. THE FRAMERS RECOGNIZED THAT THE NATIONAL GOVERNMENT'S PRIMARY DUTY IS THE PROTECTION OF THE NATION'S SECURITY

The decision below erred in ignoring this case's unique circumstances: the Nation is at war. A terrorist enemy has successfully attacked the homeland once and continues efforts to launch attacks on Americans, most recently via a fortuitously unsuccessful airline bombing attempt on Christmas Day.[4] The federal government's constitutional duty to protect the Nation and its citizens during time of war is at stake.

Strengthening the United States' ability to protect the nation's security was one of the primary motivations behind the drafting the Constitution. Anti-Federalists warned of diminished state autonomy if more powers were granted to a national government, but the Federalists won ratification of the Constitution in part because of the widely-recognized need to defend against external threats.[5] In this they heeded John Locke's claim that the "*preservation of society* . . . [and] every person in it" was the "*first and fundamental natural law*." For only after ordered security was established—"as it consisted with the public good"—could concerns about personal liberty, protection of property, rule of law, and self-government be considered. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 355-56 (Peter Laslett ed., 1988) (emphasis in original).

---

[4] *See* Anahad O'Connor and Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, NEW YORK TIMES (Dec. 25, 2009), *available at* http://www.nytimes.com/2009/12/26/us/26plane.html?scp=8&sq=Detroit%20plane%20attack&st=cse.

In the debate over ratification of the Constitution, Alexander Hamilton noted that one of "the principal purposes" of the newly created federal government was "the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks." THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Accordingly, as Hamilton rightly recognized, the Framers' intent was to endow the federal government "with all the powers requisite to [the] complete execution of" this purpose." *Id.*, at 153-54. The government's powers in the national security context were to be very broad, according to Hamilton:

---

[5] Edmund Randolph criticized the Confederation, for example, because it "produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority . . . they could not cause infractions of treaties or of the law of nations, to be punished . . . ." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 29, (Tuesday, May 29) (W.W. Norton & Co. ed. 1987). *See also*, FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3 (SR Books 1986) (1973) ("The most elemental duty of the Federation government, . . . was the protection of the country against foreign attack").

> These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Id., at 153 (emphasis omitted). This was not a stray thought, but a consistent theme in the Federalist Papers, the leading argument in favor of the ratification of the Constitution. Because "it can[not] be shown that the circumstances which may affect the public safety are reducible within certain determinate limits," Hamilton wrote, "it must be admitted as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy." THE FEDERALIST NO. 23 (Alexander Hamilton), *supra*, at 154. The federal government should possess "an indefinite power of providing for emergencies as they might arise." THE FEDERALIST NO. 34 (Alexander Hamilton), *supra*, at 207.

In the decade that followed, key proponents of ratification reaffirmed the critical importance of the authority to provide for the common defense given by the Constitution to Congress and to the President. John Adams reflected on the critical role for national defense, for example, noting: "Nothing . . . will contribute so much to the preservation of peace, and the attainment of justice, as a manifestation of that energy and unanimity of [the American people] and the exertion of those resources for national defence which a beneficent Providence has kindly placed within their power." JOHN ADAMS, SPEECH TO BOTH HOUSES OF CONGRESS, (November 22, 1797) *reprinted in* 9 THE WORKS OF JOHN ADAMS at 122 (Little Brown & Co. 1854). And in his very first Act as President, George Washington affirmed the "particular regard" which should be given to "common defence," stating in his First Inaugural Address that "to be prepared for war is one of the most effectual means of preserving peace." GEORGE WASHINGTON, SPEECH TO BOTH HOUSES OF CONGRESS (January 8th 1790) *reprinted in* WRITINGS OF GEORGE WASHINGTON at 329 (Lawrence B. Evans, ed. Knickerbocker Press 1908).

This widely-shared view was embraced a generation later by Justice Joseph Story, himself a product of the American Revolution and one of America's most respected jurists. In his highly-regarded *Commentaries on the Constitution*, Justice Story cautioned a crisis of both "liberty and sovereignty" if the government did not have authoritative power to act in defense of the nation:

> Indeed, in regard to times of war, it seems utterly preposterous to impose any limitations

> upon the power; since it is obvious that emergencies may arise, which would require the most various and independent exercises of it. The country would otherwise be in danger of losing both its liberty and its sovereignty, from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.

JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION, 98 (Melville M. Bigelow ed., Little Brown & Co. 5th ed. 1891) (1833) (emphasis added). Another great commentator on the Constitution, Thomas Cooley, was still making the same point a half century later:

> When war exists the government possesses and may exercise all those extreme powers which any sovereignty can wield under the rules of war recognized by the civilized world....

THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 86-87 (Little Brown & Co. 2001) (1880).

The tensions between liberty and safety were well understood by the Framers. Of course, no one would oppose measures that improve security with no cost to civil liberties. But when trade-offs between the two created tensions, leading Framers held the common-sense belief that the protection of the national security brought greater benefits to society. Alexander Hamilton noted in Federalist 26 that the notion "of restraining the legislative authority in the means of providing for the national defense is one of those refinements that owe their origin to a zeal for liberty more ardent than enlightened." THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* at 168. As members of the Constitutional Convention delivered the final document to the President of Congress, the cover letter acknowledged that "individuals entering into society, must give up a share of liberty to preserve the rest" and to provide for "the interest and safety of all." GEORGE WASHINGTON, LETTER FROM THE CONSTITUTIONAL CONVENTION TO THE PRESIDENT OF THE CONGRESS (September 17, 1787) *reprinted in* 2 DEBATE ON THE CONSTITUTION 937 (Library of America 1993).

One of the most urgent foreign threats in the Framers' minds was Barbary piracy. Then, as now, a renegade group flouted the law of nations and rules of civilized warfare. These outlaws disrupted the course of business and safe passage for France, Spain, England, and America as they captured ships and cargo, and killed or enslaved sailors and passengers. When Thomas Jefferson and John Adams attempted to negotiate a treaty with Tripoli, they confronted the same intransigence expressed today. They asked what justified war upon nations like America who "considered all mankind [who had done us no wrong] as our friends," and Tripolitan Ambassador to London, Sidi Haji Abdul Rahman Adja replied "that it was their right and duty to make war upon nations [who had not acknowledged their authority as written in the Koran], . . and to make slaves of all they could take as prisoners, . . ." THOMAS JEFFERSON AND JOHN ADAMS TO JOHN JAY (March 28, 1786) *reprinted in* THOMAS JEFFERSON TRAVELS: SELECTED WRITINGS 1784-1789, at 104-05 (Anthony Brandt, ed. 2006). So, free nations, without the will or means to refuse, submitted to paying tribute and ransom.[6]

So great an influence was this threat to safety and commerce on the constitutional deliberations, American historian Thomas Andrew Bailey observed, "in an indirect sense, the brutal Dey of Algiers was a Founding Father of the Constitution." THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 65 (Appleton-Century-Crofts 1955). John Jay, writing to President of Congress Richard Henry Lee, said that the Barbary threat "did not strike him as a great evil" since "the more we are ill-treated abroad the more we shall unite and consolidate at home." Jay expected that the Barbary hostilities would spur American interest in laying "foundation for a respectable Navy." JOHN JAY TO THE PRESIDENT OF CONGRESS (October 13, 1785) *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782-1793, *at* 171 (Henry P. Johnston, ed. 1891).[7]

It is against this background that this case must be understood. It would run counter to our constitutional traditions and pure common sense to read the

---

[6] The United States paid thirty times the price of a seventy-four-gun ship in ransom and tribute over a twelve-year period, or $10 million (the cost of each ship was a third of a million dollars). FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 208 (1986) (1973).

[7] When news arrived in 1793 that eleven American ships had fallen prey to the Algerines, Congress ordered the construction of six warships (although construction of three was later suspended). By 1815, the Algerines had incarcerated 450 Americans "and were only halted when a battle-hardened squadron of ten ships led by Commodore Stephen Decatur subdued a defiant Dey under the mouth of the cannon." *Id.*, at 208-09.

Constitution as disabling the federal government from effectively conducting war to protect the nation from attack, when enhancing that power was one of the principal purposes of the Constitution. It would be equally absurd to interpret the Constitution to create a greater burden on the nation's ability to fight that war when the enemy is a non-state actor, such as a terrorist organization, rather than a nation-state.

II. DURING WARTIME THE FEDERAL GOVERNMENT CAN PROHIBIT THE OPERATION OF GROUPS HOSTILE TO THE UNITED STATES OR ITS ALLIES

As this Court recognized in *Hamdi*, the United States is at war against al Qaeda and affiliated terrorists. The Authorization for Use of Military Force ("AUMF") served to activate the President's war power and to provide that combatant detention for the duration of the conflict "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004). Our terrorist enemy infiltrates agents across our borders, covertly provides them with money and assistance, and then launches surprise attacks on innocent civilians. American troops are fighting on battlefields abroad, yet the court below has undercut the reasonable efforts of government to deny aid and support to the enemy at home. In fact, the court below has made it easier for terrorists to operate within the United States than abroad, by limiting the government's powers to stop foreign hostile groups on U.S. territory, but not abroad.

Even were he acting without congressional authority, the President is invested with the constitutional duty to defend the country from attack and the power of Commander-in-Chief,[8] and so has wide discretion to deploy the forces and methods necessary for the common defense. But where, as here, the President acts in concert with Congress, his war-making powers are exceptionally broad. *Youngstown Steel Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585-86 (1952) (Jackson, J., concurring). Since not all "measures for the carrying on of war" are defined by the Constitution, "[t]he decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Steward v. Kahn*, 78 U.S. 493, 506 (1870). *See also*, *Ex parte Quirin*, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President as Commander in Chief with the power to wage war . . , and to carry into effect all laws passed by Congress for the conduct of war . . . .")

---

[8] Justice Story wrote that the power to "resist invasion" and "carry on war" cannot "properly be presumed to exist in any other department of the government [than the executive]." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 215 (Regnery Gateway, Inc. 1986) (1859); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* at 465. ("The executive . . . holds the sword of the community. The legislature . . . commands the purse . . . . The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.").

Elected government, not the courts, has been charged with the chief responsibility to protect the citizenry and defend the nation. During the Civil War, for example, in reviewing President Lincoln's suppression of insurrection, this Court deferred to the Commander-in-Chief to meet with force "such armed hostile resistance" and to confront "a civil war of such alarming proportions." *Prize Cases,* 67 U.S. 635, 670 (1863) (emphasis in original). This Court accepted that the "question [was] to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.*

The seminal holding in *United States v. Curtiss-Wright* articulated the principle that the President enjoys "broad discretion" over war policy. 299 U.S. 304, 329 (1936). The Court recognized that "the powers to declare and wage war, . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" and similarly that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *Id.*, at 318.

This Court recently re-affirmed *Curtiss-Wright*'s principle of deference in *Boumediene v. Bush*: "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches." 128 S. Ct. 2229, 2276 (2008). Indeed, *Boumediene* recognized that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Id.*, at 2276—77. Despite holding that habeas corpus extended to Guantanamo Bay, the Court did not challenge the traditional deference owed to political branches on questions of war. Against this backdrop, the *Boumediene* holding must be read narrowly.[9]

The present situation does not implicate *Boumediene* because the right of habeas corpus is not at issue. It does, however, invoke *Curtiss-Wright*'s deference principle. The overarching issue is the President's authority to designate a group as a Foreign Terrorist Organization, and to implement an Act of Congress prohibiting support for FTO's.

This Court has applied the same principle of deference in foreign affairs, where the stakes are not as grave as direct threats to national security. "Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quotes omitted); *see also*, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system").

---

[9] *See "Extraterritorial Reach of Writ of Habeas Corpus,"* 122 HARV. L. REV. 395, 400 (2008) ("Although the Court asked broadly "whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection," it answered its own question quite narrowly. Using a functional approach that took into account practical considerations, the Court limited its holding to Guantánamo Bay").

Because courts do not have the benefit of access to the larger mosaic of national security information, they have been reticent to intervene where political powers are charged with providing for national defense. As Justice Jackson put it, such decisions,

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Waterman, 333 U.S., at 111. "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.*

A. Government May Use Its Power Not Only to Prohibit Terrorist Operations But to Prohibit Support for Any Activities of The Terrorist Organizations

Congress's decision to enact the material support statute, and the President's exercise of delegated power in identifying the terrorist organizations, represents a considered wartime judgment by the political branches of the optimal means to confront the unique challenges posed by terrorism—a judgment to which this Court owes the highest deference. Al Qaeda does not control a state, does not have citizens or cities to protect, and does not field regular, uniformed armed forces that obey the laws of war. Rather than a traditional nation-state, it operates as a covert network that disguises itself within the legitimate flows of global commerce. It raises funds from donations, uses them to pay for personnel, supplies, and training, and then transports agents and communicates with them once in their target countries. Money and services are the lifeblood of a terrorist organization, just as important as access to weapons or recruiting personnel.

Congress recognized that the nation's law enforcement and security agents must be able to shut off financial support and its substitutes to terrorist groups. "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 301(a), 18 U.S.C. § 2339B *note* (1996) (emphasis added). Congress designed 18 U.S.C. 2339B "to provide the Federal Government the fullest possible basis, consistent with the Constitution," to curtail assistance to designated FTOs. AEDPA, § 301(b).

The notion that non-violent assistance, financial or otherwise, can advance an FTO's "peaceful" activities without also furthering the violent core of the group's mission is a fallacy. Financial contributions or services given to a terrorist group in one area merely frees up resources and energy for allocation to violent activities. Permitting contributions to FTOs, simply because the donor intends that they be used for "peaceful" purposes, directly conflicts with Congress's determination that no quarantine can effectively isolate "good" activities from the evil of terrorism. *See Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1189 (C.D. Cal. 1998); AEPDA § 301(a)(7).

Congress has determined that there is no discernable line between an FTO's violent and non-violent activities. "[E]ven humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 CONG. REC. S15876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl). As one court has noted:

> We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion.

United States v. Hossein Kalani Afshari, No. CR 01-00209(C), 2009 U.S. Dist. LEXIS 33887, at *28 (C.D. Cal. Apr. 14, 2009) (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000)).

1. Permitting Support for FTO Activities Labeled "Charity" Creates an Absurd, Unwarranted Exception.

HLP's position leads to the confounding result that the terrorist organization itself can neuter the Secretary's designations simply by renaming one of its factions "charity." *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. Turkette*, 452 U.S. 576, 580 (1981). If Congress cannot proscribe assistance to factions of a designated terrorist organization labeled "charity," then Congress cannot proscribe assistance effectively.

Debating the ban on material support in 1995, Congress recognized that terrorist groups operating "under the cloak of humanitarian or charitable exercise" had already established footholds in the United States. H.R. REP. NO. 104-383, at 43 (1995). This foothold allows FTOs, whether "acting through affiliated groups or individuals," to "raise significant funds within the United States . . . ." AEPDA, § 301(a)(6). A recently exposed example of this foothold is the Alavi Foundation. Incorporated in the United States as a charitable organization in 1973, Alavi Foundation's stated mission was to promote understanding of Islamic culture. *See* www.alavifoundation.org/page03.shtml. The foundation's assets were recently seized after federal agents discovered that the foundation was funneling money into Iran's nuclear program. Michael B. Farrell, *Alavi Foundation Complaint Comes at Delicate Time for US, Iran*, CHRISTIAN SCIENCE MONITOR (Nov. 12, 2009), at www.cxmonitor.com/2009/1113/ po2s17-usfp.html.

Another example, the Holy Land Foundation for Relief and Development, was the largest Muslim charity in the United States, collecting $13 million in the year 2000 alone, purportedly to assist needy Palestinians. In truth, it was funneling funds to HAMAS, a designated terrorist organization. U.S. Gen. Accounting Office, Report to Congressional Requesters: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms, GAO-04-163, 14 (2003) at http://www.nbr.org/publications/ analysis/ pdf/ vol14no5.pdf ("GAO Report"); *see Holy Land Foundation for Relief and Development v. Ashcroft,* 333 F.3d 156 (D.C. Cir 2003); *United States v. Abdulqader*, 2009 U.S. Dist. LEXIS 25011 (N.D. Tex. Mar. 26, 2009.)

As illustrated by the above examples, terrorist groups understand that a strong public relations campaign is critical to their success. *See* BRUCE HOFFMAN, INSIDE TERRORISM 3-15 (Columbia University Press 2005). Indeed, the brand "terrorist" has become so negative that the terrorists themselves avoid it with rectitudinous labels that belie their true purpose. *Id.*, at 21. "Al Qaeda," for example, has been translated as "base," "foundation," "precept," or "method." *Id.*, at 22.

The material support statute therefore eschews reliance on terrorists' self-description and focuses instead on violence. A designated terrorist organization is one that "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism." 8 U.S.C. § 1189 (2009). This definition recognizes that whatever political or religious cause the terrorist organization declares, whatever humanitarian activities the organization engages in, the organization exists to perpetrate violence. To effectively curtail FTO fundraising,[10] Congress determined that all contributions—even those purported to advance allegedly lawful functions of a terrorist organization—be prohibited:

> This section recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.

H.R. REP. 104-383, at 81.

As this Court has recognized, the fungibility of money makes financial sanctions an appropriate national security tool to weaken opponents. In *Regan v. Wald*, 468 U.S. 222, 243 (1984), this Court upheld the State Department's limitations on travel to Cuba, noting that such limitations would "curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism." *Id.* Similarly, the purpose behind provisions permitting seizure of alien property in a time of emergency is "to weaken enemy countries by depriving their supporters of power to give aid." *Farbwerke Vormals Meister Lucius & Bruning v. Chemical Foundation, Inc.*, 283 U.S. 152, 161 (1931); *see also Silesian-American Corp. v. Clark*, 332 U.S. 469, 476-477 (1947).

---

[10] Dismantling terrorist funding mechanisms is "essential," to disrupt FTO operations and limit their ability to attack. Financial Action Task Force, *Terrorist Financing* [FATFA/OECD] at 7 (Feb. 29, 2008) *available at* http://www.fatf-gafi.org/dataoecd/28/43/ 40285899.pdf.

More recently, the United Nations recognized the importance not only of freezing financial assets and economic resources but also of prohibiting the provision of funds, assets, or "financial or other related services" available to terrorists or "entities owned or controlled" by terrorists. S.C. Res. 1373 ¶ 1, U.N. Doc. S/Res/1373 (Sept. 28, 2001). States were thus instructed to "refrain from providing any form of support, active or passive," to terrorists. *Id.* It is now well accepted that criminalizing the provision of funds to terrorist organizations is a powerful tool for prevention of terrorist acts. United Nations Counter-Terrorism Implementation Task Force [CTITF], *Working Group Report: Tackling the Financing of Terrorism*, ¶ 9, (October 2009), at http://www.un.org/terrorism/pdfs/CTITF_financing_ENG_final.pdf.

Non-monetary work or services provided to these terrorists can be as good as cash, allowing the organization to defray costs of its overt activities, divert funds to the purchase of arms, and free up personnel for missions of terror. The provision of personnel and services lends credibility to the terrorist organization, which in turn assists with recruitment, radicalization, and grassroots support. As noted by the Financial Action Task Force, "propaganda and ostensibly legitimate social or charitable activities are needed to provide a veil of legitimacy." Financial

Action Task Force, *Terrorist Financing* at 7 (Feb. 29, 2008) at http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf (*"Terrorist Financing").*

2. Charitable Donations Are A Mainstay of Terrorist Financing

The nature of the terrorist organization is unaffected by its label, but its potential donors are greatly influenced by words. Few people will knowingly provide assistance to terrorists, but countless individuals donate to charities each year--often without knowledge of where their money eventually goes. *Id.*, at 13, n. 12. The combination of a large and steady source of money and lack of financial oversight make charitable organizations fertile soil for terrorist fundraising. GAO Report at 13-14.

It is well documented that terrorist organizations use charities—pre-established or of their own creation—to raise funds. GAO Report at 13-14; *Terrorist Financing* at 8, 12; Zachary Abuza, NBR Analysis, *Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiyah*, Vol. 14, No. 5, at 7-8 (December 2003), http://www.nbr.org/publications/analysis/pdf/vol14no5.pdf. So widespread is terrorism's abuse of charitable organizations that the Financial Action Task Force found "the misuse of non-profit organisations [sic] for the financing of terrorism is coming to be recognised [sic] as a crucial weak point in the global struggle to stop such funding at its source." *Terrorist Financing, supra*, at 11. The trend is not new; Al Qaeda began manipulating charities in the late 1990's by installing terrorists into leadership roles of various charitable organizations. Abuza, *supra* at 22.

The move was so successful that charity has been described as Al Qaeda's financial backbone. *Id.*, at 8.

International terrorist organizations such as The Kurdistan Workers' Party, the Liberation Tigers of Tamil Eelam ("LTTE"), Hamas, and their ilk systematically conceal their violent activities behind charitable, social, and political fronts. The idea that there is a distinction between an FTO's violent and its "humanitarian" work is a myth. A former FBI counterterrorism intelligence analyst confirms that there is no division of terrorist goals as an FTOs overt, "legitimate" activities are central to recruiting, indoctrinating, training, funding, and "dispatch[ing] suicide bombers to attack civilian targets." MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD, 6 (Yale University Press 2006).

Inside the Palestinian territories, for example, Hamas operates mosques, schools, orphanages, and summer camps. The benevolent façade hides a sinister intent:

> Hamas uses the mosques and hospitals it maintains as meeting places, buries caches of arms and explosives under its own kindergarten playgrounds, uses social-welfare operatives' cars and homes to ferry and hide fugitives, and transfers and launders funds for terrorist activity through local charity committees.

LEVITT, *supra* at 6; *see also* 153 CONG. REC. S15876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl). The internet can be manipulated as well. LTTE established its first internet site, TamilNet.com, in 1995. HOFFMAN, *supra* at 204. After the Sri Lanka tsunami in December 2004, LTTE's web sites contained links to information about relief efforts, encouraging would-be donors to "contact your nearest Tamils Rehabilitation Organisations [sic] office." *Id.* at 205. The Tamils Rehabilitation Organization "is the preferred means for sending funds from the United States to the LTTE in Sri Lanka," and was designated as a terrorist organization for the purpose of freezing its assets in November 2007. Press Release U.S. Dep't. of the Treas., Treasury Targets U.S. Front for Sri Lankan Terrorist Organization, TG-22 (Feb. 11, 2009). Its sister organization, the Tamil Foundation, was recently named a terrorist organization as well. *Id.* These links are no coincidence; FTO's understand the power of charity. In 1993, federal law enforcement officials undertook surveillance of a meeting in Philadelphia amongst members of the Palestine Committee. During the meeting, the leaders discussed how best to utilize the United States as a safe and lucrative place for fundraising and propaganda, stressing that the capabilities for fund-raising in America were amplified by its "democratic environment." Conference attendees recognized that effective fundraising in America required an agreeable disguise. *See* Transcript of Trial at Vol. 15, 103:13—04:2, *United States v. Holy Land Found. for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P). As one member of the Palestine Committee suggested:

> [L]et's stay ahead of the events, our brothers. . . . [W]e should start right now, my broth-

> ers, begin thinking about establishing alternative organizations which can benefit from a new atmosphere, ones whose Islamic hue is not very conspicuous.

Id.

These new organizations would support the families of the martyrs, but the members knew this would be unpalatable in the United States. *See* Transcript of Trial at Vol. 11, 67-68, *United States v. Holy Land Found for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P). Thus they determined they would mask their goal under the banner of human rights—care for all Palestinians. "Our relationship with everyone must be good but we gave the Islamists $100,000 and we give others $5,000." *Id.*, at Vol. 14, 169:21-170:1.

In response to the Philadelphia meeting, numerous Islamic charities were chartered in the United States and throughout the world, operating as front groups for Hamas. Many have since been investigated, indicted, and convicted for their roles in funneling financial and other resources to Hamas and other designated terrorist organizations. For example:

- The Holy Land Foundation for Relief and Development claimed to be supporting humanitarian efforts in the Palestinian territories, but the FBI claimed that Holy Land Foundation funds were used by Hamas to indoctrinate children into careers as suicide bombers. Memorandum from Dale Watson, Assistant Director for Counterterrorism, FBI, to R. Richard Newcomb, Director of the office of Foreign Assets Control, "Holy Land Foundation for Relief and Development, International Economic Emergency Powers Act, Action Memorandum," U.S. Department of the Treasury 16-18, 27 (Nov. 5, 2001) *available at* http://fletcher.tufts.edu/forum/archives/pdfs/27-1pdfs/Levitt3.pdf, n. 17. "[B]y providing these annuities to families of Hamas members, the HLFRD assists Hamas by providing a constant flow of suicide volunteers and buttresses a terrorist infrastructure heavily reliant on moral support of the Palestinian populace." *Id.*

- The Global Relief Foundation publicly claimed to be a humanitarian relief organization, but produced and distributed a pamphlet in 1995 which reads: "God equated martyrdom through jihad with supplying funds for the jihad effort. All contributions should be mailed to GRF." Press Release, U.S. Dep't. of the Treas., Treasury Department Statement Regarding the Designation of the Global Relief Foundation PO-3553 (Oct. 18, 2002). GRF "has connections to, has provided support for, and has provided assistance to Usama Bin Ladin, the al Qaida Network, and other known terrorist groups." *Id.*

- The Islamic Committee for Palestine was a self described "humanitarian" group which served as a front organization for Palestinian Islamic Jihad. *Progress Since 9/11: The Effectiveness of the U.S. Anti-Terrorist Financing Efforts: Hearing before the House Comm. on Financial Services, Subcomm. on Oversight and Investigations*, Serial No. 108-10 at 30, 73 (March 11, 2003) (Statement of

> Steven Emerson, Director, The Investigative Project). At an ICP-organized Chicago conference held in 1990, one speaker enumerated the "operations" carried out by Islamic Jihad "martyrs" in Palestine and solicited funds for the families of the terrorists.

Id.

These examples underscore what is already known: terrorists cannot be expected to provide truthful discourse about their activities, nor sequester violence from public service. Groups will build schools, hospitals, and roads in order to win the public support, but any humanitarian effort exploited by terrorists is charity in name only. Rather than mitigate the violence that these groups promote, their humanitarian projects advance their destructive agendas.[11]

This type of deception by regulated individuals or groups is nothing new. This Court has refused to allow designated enemy nationals to avoid the law by subterfuge. Like terrorists hiding behind charity, enemy nationals who used shams to hide their interest in assets were "neutral in name only" and could not escape their "enemy taint." *Uebersee Finanz-Korporation, A. G. v. McGrath*, 343 U.S. 205, 211 (1952) (petitioner neutral in name only due to predominant influence of enemy national); *Stoehr v. Wallace*, 255 U.S. 239, 251 (1921).

---

[11] AEDEPA defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d). The United States Department of Defense defines it as: "The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." Department of Defense, Dictionary of Military and Associated Terms 550 (Aug. 19, 2009) at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf; *see also* HOFFMAN, *supra*, at 31.

If the Court adopts the view of the Ninth Circuit —that it is possible to donate to "good" parts of a terror organization without benefiting the "bad"—then we will reach "the brink of a precipice of absurdity." *See AT&T Corp. v. Hulteen*, S. Ct. 1962, 1980 (2009). Viewing an organization such as Hezbollah in terms of charity without regard to its terrorist arm is "to think of something which is inextricably related to some other thing and not think of the other thing." *Id.* Congress avoided this absurd result by proscribing *all* support. To do anything less renders the ban on material support meaningless and permits terrorists to manipulate not only our charity, but our law as well.

III. SECTION 2339B DOES NOT UNCONSTITUTIONALLY INFRINGE UPON PROTECTED SPEECH

Though the First Amendment provides foundational rights, it is only one part of an entire Constitution. This Court has never adopted the view that absolutism for the First Amendment should come at the cost of the Constitution's other provisions.

In the instant case, First Amendment absolutism cannot come at the cost of preventing the political branches from fulfilling their constitutional duty to protect and defend the nation. While the statute at issue does not escape constitutional scrutiny by this

Court altogether, "it is part of the process of constitutional scrutiny to recognize when the Constitution itself requires special deference." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

Respondent argues that section 2339B could conceivably restrict the ability of U.S. citizens to express their ideas, in violation of the First Amendment. This Court has several reasons to reject this claim. First, the statute is designed to prohibit "supporting" and "aiding" terrorists. This is conduct. Unless the conduct itself is expressive, this Court has held, and should continue to hold, that a First Amendment analysis is inappropriate. Second, even if section 2339B does touch upon free speech, the statute sufficiently advances an important government interest and is narrowly tailored to pass intermediate scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968). And third, even if this Court decided to apply strict scrutiny, section 2339B is constitutional because the interest is compelling, the need is great, and the statute is narrowly limited to providing "service" or "support" to groups which have a stated goal of killing U.S. citizens.

A. The Material Support Statute Regulates Conduct, Not Speech, and Incidental Restrictions on Speech Do Not Trigger First Amendment Scrutiny.

The First Amendment acts as a shield against those who would stifle the free expression of ideas. But the shield is not an all-encompassing aegis, applicable wherever words are spoken. To the contrary, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*") 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Because individuals are still free to verbally endorse the ideas advanced by these terrorist organizations, the statute does not affect free speech, and this Court should hold that section 2339B does not implicate the First Amendment. *See id.*, at 61-62.

If a statute restricts conduct rather than directly limiting speech, it only implicates the First Amendment if it impairs actions that are "inherently expressive." *Id.*, at 66. Even if expressive, conduct may still not be protected by the First Amendment if "[t]he expressive component . . . is not created by the conduct itself but by the speech that accompanies it." *Id.* In other words, the action being restricted must have an expressive element.

It is quite clear Congress did not want to ban "speech" or "association" but rather the conduct of aiding terrorism more generally. *United States v. Taleb-Jedi,* 566 F.Supp.2d 157, 167 (2008).

Here, supporters of Hizballah, PKK, LTTE or any other FTO are free to discuss and even advocate for these groups and not run afoul of section 2339B. They could purchase ads, publish articles, give speeches, lobby Congress, and file amicus briefs that espouse the exact same political positions as those held by terrorist groups. During World War II, for example, Congress and the President could legitimately ban the U.S. operations of Germany's Nazi

Party, even if the First Amendment allowed speech through other conduits that advocated a negotiated settlement with the Axis powers. But under respondent's position, the Constitution would require the political branches, in wartime, to allow the Nazi party to raise money and organize in the United States itself.

This Court has never read the Constitution to require such an absurd result. Congress's interest is in preventing the harm to United States civilians—not the suppression of free expression. Therefore, even if "knowingly providing material support" involves words, it is not an expression that the First Amendment was designed to protect.[12]

B. If The Court Finds Speech Rights Are Implicated, The *O'Brien* Intermediate Scrutiny Standard Is Still Satisfied

Even if this Court holds that free speech was directly affected, free speech is not the target of section 2339B and as such strict scrutiny is inappropriate. Rather, if free speech is implicated at all, the correct test is that of *United States v. O'Brien*, 391 U.S. 367 (1968).

---

[12] When Constitutional challenges to the Internal Security Act of 1950 (in part, whether membership in Communist Party could be a criminal violation), analysis turned on whether "the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

If government conduct indirectly affects free speech, "a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.*, at 376. An incidental free speech limitation is constitutional if:

> [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., at 376-77.

In *O'Brien*, this Court considered whether the burning of a draft card was protected expression. It concluded that Congress's ability to raise and support armies is so "broad and sweeping" as to outweigh any conceivable First Amendment violation. *Id.*, at 375-76. This Court should reach a similar judgment with the material assistance statute: the political branches' ultimate duty to protect the Nation from external attack outweighs any alleged First Amendment interests.

In ***FAIR***, this Court affirmed that *O'Brien* applies when conduct is "inherently expressive." ***FAIR***, 547 U.S., at 66. The test makes sense. *O'Brien* accurately weighs the importance of protecting speech (even if it is only incidentally being suppressed) with the importance of the government action in each case. Here, protecting free speech must be balanced against the discretion lodged in the Legislative and Executive branches regarding foreign affairs, where "judicial deference . . . is at its apogee." *Id.* at 58 (quoting *Rostker*, 453 U.S., at 67).

Applying *O'Brien*, the government's overriding and compelling objective of defeating terror justifies any incidental restrictions. The government interest is at a minimum "important" or "substantial," see *id.*, at 376, as "[i]t is obvious and unarguable that no government interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Nor is the statute intended to restrain speech: Section 2339B does not prohibit the expression of ideas similar to the designated terrorist groups, but rather seeks to avoid the manifestation of those ideas in violence. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000).

Section 2339B extends no further than is essential to address national security. It "does not restrict a person's right to join an organization." H.R. REP. 104-383, at 43. Nor is an individual restricted from freely expressing an ideology or political philosophy. *Id.*, at 45. "Those inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of . . . foreign organizations [designated FTO's]." *Id.* Courts have been careful to distinguish between "groups that ... merely advocate terror, violence, and murder of innocents" and those that "actually carry out what they advocate," so that the court can draw a "clear line between First Amendment protected activity and criminal conduct for which there is no constitutional protection."

United States v. Lindh, 212 F. Supp 2d 541, 568 (E.D.Va. 2002).

Section 2339B satisfies the *O'Brien* factors, and passes First Amendment scrutiny.

C. The Material Support Statute Survives Even Strict Scrutiny, as National Security is the Utmost Compelling Interest and The Statute is Narrowly Tailored to Protect The Nation from International Terrorism

In national security and foreign affairs, the strict scrutiny standard is ill-suited to this Court's longstanding deference to the Legislative and Executive branches. *See Rostker*, 453 U.S., at 67. Strict scrutiny is particularly inappropriate where, as here, the government does not restrict activity because of the content or viewpoint of speech. However, even if the Court applies strict scrutiny, section 2339B remains constitutional. Preventing terrorism and weakening terrorist groups is a compelling interest. Preventing aid and support to those groups serves that interest. And, despite wide-ranging hypotheticals to the contrary, section 2339B was designed to allow speech, advocacy, and other domestic expression. No intuitive reading suggests otherwise.

1. Preventing Aid to Terrorists Is A Compelling Government Interest

"[N]o governmental interest is more important than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). In the 21st century, the Executive has made clear that the most significant external threat is global terrorism:

> Terrorist networks currently pose the greatest national security threat to the United States. . . . The enemy is a federated terrorist threat complex with the character of a global insurgency. . . .

See Statement, Department of State, Office of the Coordinator for Counterterrorism, available at http://www.state.gov/s/ct/enemy/index.htm (last visited December 22, 2009).

Congress concurred with the Executive's description of the terrorist threat when it passed the Anti-Terrorism and Effective Death Penalty Act, which contains section 2339B, noting that international terrorism "threatens the vital interests of the United States." *See* Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(1) & (7), 18 U.S.C. § 2339B *note* (1996).

No decision by this Court has held that national security, when dealing with a clear and present threat, is anything other than compelling. The Court must not deviate here, where the country has been directly attacked by terrorist groups in two of its major cities and lost almost 3,000 civilian lives.

2. The "Narrowly Tailored" Prong Must Be Applied in The Context of the Unpredictable and Dangerous Realm of Foreign Affairs.

Whether or not a government action was sufficiently "tailored" must depend on the context in which the action was taken. When it comes to areas where the Executive and Legislative branches have greater expertise or knowledge, such as creating the Army or Navy, there is significantly more deference to those branches' choices: "The issue is not whether other means of raising an army and providing for a navy might be adequate." ***FAIR***, 547 U.S. at 67. "Regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Because a judge is less capable of identifying and neutralizing terrorist threats, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689 Indeed:

> In *Community for Creative Non-Violence*, [468 U.S. 288, 299 (1984)] we observed that *O'Brien* does not assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained. We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation.

Id. (internal citations and quotation marks omitted).

Before determining whether section 2339B is narrowly tailored, this Court should recognize that a large amount of deference is due—and the other branches decided that section 2339B is the best way to prevent aid to terrorists.

3. Preventing All Aid, Support, or Assistance to Terrorist Groups is an Appropriate Response to a Terrorist Threat

Perhaps in no other area has the Court accorded Congress greater deference than in cases that arise in the context of Congress's authority over national defense and military affairs. *Rostker*, 453 U.S., at 64-65. In times of war, as now, this deference is even more pronounced. Courts have deferred to wartime actions of the political branches even when such actions have directly infringed speech-related liberties of individuals. For example, in *Schenck v. United States*, this Court upheld the treason convictions of several men who had distributed subversive, anti-war literature during World War I. 249 U.S. 47, 48-49 (1919). This Court held that distributing literature which encouraged resistance to the draft presented a sufficient danger to national security that it was not entitled to First Amendment protection. *Id.*, at 51-53. This Court further stated: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*, at 52. As this Court further explained in *Near v. Minnesota*, 283 U.S. 697, 716 (1931): "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." In

United States v. Progressive, Inc., a federal district court enjoined the publication of a "how-to" guide for making a hydrogen bomb. 467 F. Supp. 990 (W.D. Wis. 1979). Citing *Near*, the district court stated that "grave national security concerns. . . are sufficient to override First Amendment interests." *Progressive*, 467 F. Supp. at 992; *see also Near*, 283 U.S., at 716.

This deference does not end with foreign affairs. Indeed, there are many cases where incidental free speech concerns give way to the needs of government. For example, when balancing speech rights and public safety, this Court established that a criminal statute enacted for the legitimate purpose of deterring criminal activity does not violate the First Amendment if individuals decide to censor themselves. *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 59-60 (1989). The petitioner in that case argued that the Racketeer Influenced and Corrupt Organizations Act ("RICO") unconstitutionally chills First Amendment freedoms because its "draconian" sanctions intended for use as "heavy artillery" for the "war on crime" will compel adult booksellers to remove First Amendment protected content from their shelves to avoid potential prosecution. *Id.*, at 59-60. The Court disagreed: "[M]ere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents." *Id.*, at 60.

Nor is section 2339B unconstitutional merely "because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Striking down Section 2339B for some potentially more narrow definition would substitute this Court's judgment for that of the political branches about the most effective way to conduct war.

Section 2339B furthers the most compelling of government interest - preventing future attacks on the Nation. Any particular instances of speech prohibited by Section 2339B are insubstantial compared to the duty of the government to protect the national security in time of war.

CONCLUSION

The decision of the court below should be reversed.

DATED: December 29, 2009.

Respectfully submitted,

HON. EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, DC 20002

ANDREW C. MCCARTHY
233 Pennsylvania Ave., SE
3rd Floor
Washington, DC 20003

DAVID B. RIVKIN, JR.
Baker Hostetler
1050 Washington Square
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036

CASEY J. MCTIGUE
Severson & Werson, P.C.
One Embarcadero Center
Suite 2600
San Francisco, CA 94111

MICHELLE J. CONTOIS
800 S. Victoria Ave.
Suite 314
Ventura, CA 93009

JOHN C. EASTMAN
Counsel of Record
JOHN C. YOO
KAREN J. LUGO
RYAN T. DARBY
Center for Constitut'l
Jurisprudence
c/o Chapman Univ.
School of Law
One University Drive
Orange, CA 92886
(714) 628-2500

Counsel for Amici Curiae
Center for Constitutional Jurisprudence
and Center for Law and Counterterrorism

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
DEC 28 2009
OFFICE OF THE CLERK

14 14

Nos. 08-1498 and 09-89

IN THE SUPREME COURT OF THE UNITED STATES

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Petitioners,
v.
HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

Anthony S. Barkow
David B. Edwards
Center on the Administration of
Criminal Law
110 West Third Street,
Suite 214
New York, New York 10012
(212) 998-6612

Michael Y. Scudder, Jr.
Counsel of Record
Patrick M. Crook
Courtney E. VanLonkhuyzen
Skadden, Arps, Slate, Meagher
& Flom LLP
155 North Wacker Drive
Chicago, Illinois 60606-1720
(312) 407-0700

COUNSEL FOR AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE MATERIAL SUPPORT STATUTES ARE ESSENTIAL TOOLS TO PREVENT TERRORISM 6

II. THE DEPARTMENT OF JUSTICE HAS FREQUENTLY AND SUCCESSFULLY USED SECTION 2339B IN MANY CASES FOLLOWING THE SEPTEMBER 11 ATTACKS...... 10

III. FEDERAL CRIMINAL PRACTICE PROVIDES SAFEGUARDS TO PROTECT DEFENDANTS' FIRST AMENDMENT RIGHTS IN SECTION 2339B MATERIAL SUPPORT PROSECUTIONS 13

IV. THE NINTH CIRCUIT'S REASONING IS FLAWED AND WOULD SIGNIFICANTLY LIMIT NECESSARY COUNTERTERRORISM EFFORTS 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Boim v. Holy Land Foundation for Relief & Development, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) .. 9, 10

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 13

Coates v. Cincinnati, 402 U.S. 611 (1971) 20

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988) 21

Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009) 3, 4, 8, 10, 23, 24

Mathews v. United States, 485 U.S. 58 (1988) 16

Noto v. United States, 367 U.S. 290 (1961) 20

Rostker v. Goldberg, 453 U.S. 57 (1981) 21

United States v. Afshari, 426 F.3d 1150 (9th Cir. 2005) 16

United States v. Bly, 510 F.3d 453 (4th Cir. 2007) 15

United States v. Feola,
420 U.S. 671 (1975) 7

United States v. Fleschner,
98 F.3d 155 (4th Cir. 1996) 16, 17

United States v. Freeman,
761 F.2d 549 (9th Cir. 1985) 17

United States v. Hammoud,
381 F.3d 316 (4th Cir. 2004) (en banc),
vacated on other grounds,
543 U.S. 1097 (2005) 20

United States v. Hsu,
155 F.3d 189 (3d Cir. 1998)............................. 7

United States v. Klein,
515 F.2d 751 (3d Cir. 1975) 8

United States v. Lindh,
212 F. Supp. 2d 541 (E.D. Va. 2002)............. 11

United States v. Newman,
490 F.2d 139 (3d Cir. 1974)............................. 8

United States v. Rahman,
189 F.3d 88 (2d Cir. 1999)............17, 18, 19, 20

United States v. Sattar,
272 F. Supp. 2d 348 (S.D.N.Y. 2003) 15, 16

United States v. Sattar,
395 F. Supp. 2d 79 (S.D.N.Y. 2005),
aff'd, No. 06-5015, 2009 WL 3818860 (2d Cir. Nov. 17, 2009, amended Dec. 23, 2009) 19

United States v. Syring,
522 F. Supp. 2d 125 (D.D.C. 2007) 15

United States v. Taleb-Jedi,
566 F. Supp. 2d 157 (E.D.N.Y. 2008) 16, 19

United States v. Warsame,
537 F. Supp. 2d 1005 (D. Minn. 2008) 16

United States v. Williams,
128 S. Ct. 1930 (2008) 19

Statutes

8 U.S.C. § 1189(a)(1)(A)-(C) 2

18 U.S.C. § 2339A .... *passim*

    18 U.S.C. § 2339A(a) 8

    18 U.S.C. § 2339A(b)(1) 2, 3

    18 U.S.C. § 2339A(b)(2) 3

    18 U.S.C. § 2339A(b)(3) 3

18 U.S.C. § 2339B .... *passim*

    18 U.S.C. § 2339B(g)(4) 3

18 U.S.C. § 2339B(i) 14

18 U.S.C. § 2339B(j) 6, 20

Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2

Pub. L. No. 104-132, § 301(a)(7) 9

Intelligence Reform & Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638 3

Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a) 8

Supreme Court Rules

Supreme Court Rule 37.6 1

Federal Rules of Criminal Procedure

Fed. R. Crim. P. 12(b) 15

Fed. R. Crim. P. 29(a) 19

Other

The Center on Law & Security, New York University School of Law, Terrorist Trial Report Card: September 11, 2008, *available at* http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf (last visited Dec. 19, 2009) 11

September 11, 2008 DOJ Fact Sheet #08-807: Justice Department Counterterrorism Efforts Since 9/11, *available at* http://www.justice.gov/opa/pr/2008/September/08-nsd-807.html (last visited Dec. 19, 2009) 10, 11

News Release, U.S. Immigration & Customs Enforcement News, Indictment Charges 4 with Conspiracy to Support Hezbollah; 6 Others Charged with Related Crimes (Nov. 24, 2009), *available at* http://www.ice.gov/pi/nr/0911/091124philadelphia.htm 13

Press Release, Dep't of Justice, Chicagoan Charged with Conspiracy in 2008 Mumbai Attacks in Addition to Foreign Terror Plot in Denmark (Dec. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-nsd-1304.html 12

Counterterrorism White Paper, Counterterrorism Section, Dep't of Justice (June 22, 2006), *available at* http://trac.syr.edu/tracrports/terrorism/169/include/terrorism.whitepaper.pdf........ 10, 11

Press Release, Dep't of Justice, Examples of Terrorism Convictions Since September 11, 2001 (June 23, 2006), *available at* http://www.justice.gov/opa/pr/2006/June/06_crm_389.htm 12

Dep't of Justice, U.S. Attorneys' Manual Title 8, Civil Rights Resource Manual § 8.142, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title8/cvr00142.htm (last visited Dec. 19, 2009) 15

Dep't of Justice, U.S. Attorneys' Manual Title 9, Criminal Resource Manual § 9-2.136, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136 (last visited Dec. 19, 2009) 14

President Barack Obama, Remarks to the Nation on the Way Forward in Afghanistan & Pakistan (Dec. 1, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan 24

Roth et al., National Commission on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing, Staff Report to the Commission* (2004), *available at* http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf 9

Transcript of Judge's Instructions & Charge to the Jury, *United States v. Sattar*, No. S102CR395, 2005 WL 6177268 (S.D.N.Y. Jan. 12, 2005) 18

Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, Human Rights First (May 2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf 11

INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. The Center's litigation program aims to use its empirical research and experience with criminal justice and prosecution practices to assist with important criminal justice cases in state and federal courts. The Center regularly comments on issues of broad importance in criminal law, including on issues involving the exercise of prosecutorial discretion to enforce federal statutes.

The Center files this *amicus* brief in support of the United States to illustrate and reinforce the importance to national security of broad inchoate and facilitation liability under federal criminal law, including under the material support to terrorism statute at issue here, 18 U.S.C. § 2339B. If upheld, the Ninth Circuit's decision would strip prosecutors of a tool that has proven essential to depriving terrorist organizations of support necessary to advance their violent missions. Furthermore, as explained below, the criminal justice system includes multiple safeguards to protect First Amendment rights in individual prosecutions. Section 2339B, in short, is neither vague nor overbroad, but rather is a necessary means through which federal prosecutors—subject to multiple checks and balances inside and outside courtrooms—protect the nation from further terrorist attacks.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and the Court's docket reflects this consent.

BACKGROUND

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Congress provided the Executive Branch with a twofold means to prevent and prosecute support for terrorist activity that often escaped pre-existing federal criminal law. The Secretary of State became empowered to designate a group as a "foreign terrorist organization" ("FTO"), 8 U.S.C. § 1189(a)(1)(A)-(C), and Congress also made it a crime knowingly to provide or attempt to provide "material support or resources" to an FTO or an organization engaged in terrorist activity, 18 U.S.C. § 2339B.

Federal law defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

Id. §§ 2339A(b)(1), 2339B(g)(4).

In the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, Congress explained that "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). "[E]xpert advice or assistance" is "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* § 2339A(b)(3). The term "service" is not defined by statute.

The Humanitarian Law Project ("HLP") wishes to support the nonviolent and lawful activities of two FTOs, the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam. HLP argues that it cannot determine whether its desired support would run afoul of the prongs of the "material support or resources" definition barring "service," "training," "expert advice or assistance," and "personnel." Accordingly, HLP contends that these aspects of Section 2339B are unconstitutionally vague and overbroad.

While rejecting HLP's overbreadth challenge, the Ninth Circuit agreed with aspects of HLP's vagueness challenge, holding that the terms "service" and "training," as well as the "other specialized knowledge" component of the definition of "expert advice or assistance," are impermissibly vague. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009). The court—though stating that HLP had not brought a facial vagueness challenge to Section 2339B—reasoned that "it is easy to imagine protected expression that falls within the bounds of the term 'service,'" "other specialized knowledge covers every conceivable subject," and "training could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 929-30.

The Center agrees with the Solicitor General that Section 2339B is neither unconstitutionally vague nor overbroad and thus the Ninth Circuit's ruling should be reversed in part.

SUMMARY OF ARGUMENT

Preventing terrorism requires thwarting plots and starving terrorist organizations of the resources necessary to fund their violent missions. All elements of national power, including federal criminal law, contribute to this effort. Indeed, broad inchoate and facilitation liability are essential to the successful prevention and deterrence of terrorism. Particularly important are forms of criminal liability that operate on the front-end to stop individuals from executing planned acts of terrorism and to curtail the flow of essential resources to terrorist organizations. The Department of Justice relies on these means to stay a step ahead of terrorists and thus to remain proactive in its efforts to protect the nation.

Section 2339B exists for this exact purpose—to preclude individuals from providing certain enumerated forms of support to FTOs. The statute filled a significant gap in pre-existing law and thereby equipped the Department of Justice with a way to prevent the flow of resources to terrorists. As the public record shows, federal prosecutors frequently have employed Section 2339B across many cases to curtail support to al Qaeda and other terrorist groups. It is essential to America's continued security that federal prosecutors remain able to use Section 2339B to stop and hold accountable individuals who provide support to terrorists who threaten our national security. The Ninth Circuit's ruling eliminates key aspects of Section 2339B on strained and unpersuasive reasoning.

Reversing the Ninth Circuit's flawed ruling does not risk applications of Section 2339B that will punish protected speech and conduct. To the contrary, the criminal justice system has sufficient safeguards and mechanisms in place to protect First Amendment rights. Not only does Department of Justice policy require senior independent review and approval of all charging decisions under Section 2339B, but defendants also have well-established processes available to them in federal court to challenge applications of the statute that they believe violate their First Amendment rights.

On this score, defendants can move to dismiss an indictment and thereby invoke judicial scrutiny to assess whether particular applications would infringe upon defendants' First Amendment rights. So, too, are defendants entitled to a jury instruction informing the jury that it cannot return a guilty verdict if it finds (under standards explained by the court) that defendants engaged in protected speech or conduct. In addition, the law permits a defendant, at the close of the government's evidence or upon return of a guilty verdict, to ask for a judgment of acquittal on the ground that it would violate his First Amendment rights to permit entry of a guilty verdict on the record before the court. As yet another protection, a defendant may appeal an adverse jury verdict on First Amendment grounds. These processes are sufficient to protect First Amendment rights in Section 2339B prosecutions. Beyond that, an individual can eliminate any risk of prosecution in the first instance by first vetting the planned support to an FTO with the Secretary of State and receiving her approval under 18 U.S.C. § 2339B(j).

ARGUMENT

I. THE MATERIAL SUPPORT STATUTES ARE ESSENTIAL TOOLS TO PREVENT TERRORISM.

The attacks of September 11, 2001 made plain the devastating consequences of international terrorism. The United States responded with military force and a commitment at all levels of government to a robust strategy of prevention and deterrence of terrorism by thwarting terrorist plots and holding terrorists and their enablers accountable for their actions.

Continued success depends in part upon the Department of Justice's continued use of all means available in the Federal Criminal Code to prevent and respond to terrorist acts. On the response side, numerous statutes, ranging from terrorism-specific offenses to more general offenses such as money laundering or narcotics trafficking, enable the Department of Justice to prosecute and punish individuals who have engaged in completed acts of terrorism or activity connected to terrorist plots. The pinnacle objective is not response, however, but rather prevention. In the wake of September 11, the nation committed to a multifaceted preventative strategy, which relies in part upon the Department of Justice's robust enforcement of certain provisions of federal criminal law designed to address conduct at the initial, formative stages of terrorist plots, before planning turns to violence.

The prime example of a form of criminal liability that operates in a preventative dimension is conspiracy liability. The investigation and prosecution of conspiracy enable the Department of Justice to halt terrorist plans in advance of an attack by removing key players in a plot and exposing others. In describing traditional conspiracy liability, this Court emphasized these same tenets:

> The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.

United States v. Feola, 420 U.S. 671, 694 (1975) (internal citation omitted); *see also United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) (explaining that "the law of conspiracy [compared to attempt] is much more preventive, aiming to nip criminal conduct in the bud before it has the chance to flourish into more ominous behavior").

While traditional conspiracy liability is critical to the successful prevention of acts of terrorism, it does not permit federal prosecutors to focus on individuals who lack the mental state necessary to commit or aid a terrorist act but who nonetheless provide important support to terrorist organizations. This precise shortcoming of conspiracy liability—its limited ability to stymie mere preparatory stages of terrorism by choking off financial resources and human capital to terrorists—is what ultimately led to the material support statute challenged here, Section 2339B.

Congress passed the first of two material support laws, 18 U.S.C. § 2339A, as part of the Violent Crime Control and Law Enforcement Act of 1994. *See* Pub. L. No. 103-322, § 120005(a). Section 2339A makes it a crime to, among other things, provide "material support or resources" or to conceal or disguise the "nature, location, source, or ownership" of material support or resources in connection with an enumerated list of violent crimes. 18 U.S.C. § 2339A(a). The enactment requires proof that an individual "know[s] or intend[s] that [the material support or resources] are to be used in preparation for, or in carrying out" those crimes. *Id.*; *see also Humanitarian Law Project*, 552 F.3d at 927 (explaining that Section 2339A requires proof of specific intent to further illegal activities of an organization through the provision of material support or resources).

Section 2339A is therefore similar to longstanding federal offenses creating accomplice and inchoate liability, which have been interpreted to require knowledge or intent in connection with a specific criminal act. *See, e.g.*, *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) ("To support a conspiracy conviction, the government must show both an agreement and a specific intent to achieve some unlawful goal."); *United States v. Newman*, 490 F.2d 139, 142 (3d Cir. 1974) ("[T]he aiding and abetting statute, 18 U.S.C. § 2, has been construed to require a specific intent to bring about a criminal act.")

Despite the long history of federal inchoate and accomplice liability, and the enactment of Section 2339A to create direct facilitation liability just two years earlier, Congress continued to see a gap in the criminal counterterrorism arsenal. In particular, the mental state requirements of conspiracy liability and material support liability under Section 2339A presented difficult barriers to curtailing the flow of resources to terrorist organizations. *Cf.* Roth et al., Nat'l Comm'n on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing: Staff Report to the Comm'n* (2004), at 31-32, *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf (explaining that "[b]efore the [1996] enactment of this statute, prosecuting a financial supporter of terrorism required tracing donor funds to a particular act of terrorism–a practical impossibility"). Nowhere did the Federal Criminal Code expressly proscribe the indirect facilitation of terrorism—*i.e.*, facilitation without proof of knowledge or intent to commit a specific act of terrorism—through the provision of resources to terrorist organizations.

Accordingly, after extensive hearings, Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." Pub. L. No. 104-132, § 301(a)(7) (emphasis added); *cf. Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), *cert. denied*, 130 S. Ct. 458 (2009). Thus came the 1996 enactment of Section 2339B as part of AEDPA.

Section 2339B, unlike Section 2339A, does not require knowledge or intent that the "material support" facilitate an unlawful act. Rather, as the Ninth Circuit correctly recognized, under Section 2339B the government need prove only that the defendant knew that that organization receiving particular support is designated as an FTO or that such organization has engaged or engages in terrorist activity. *See Humanitarian Law Project*, 552 F.3d at 925. In this way, then, Section 2339B—unlike traditional conspiracy liability or Section 2339A—empowers the Department of Justice to intervene much earlier on the criminal continuum and thereby prevent the flow of essential resources to an FTO presenting risks to our national security.

II. THE DEPARTMENT OF JUSTICE HAS FREQUENTLY AND SUCCESSFULLY USED SECTION 2339B IN MANY CASES FOLLOWING THE SEPTEMBER 11 ATTACKS.

Federal prosecutors have made extensive use of the material support laws to disrupt and prevent terrorist plots. Indeed, the Department of Justice has described the material support statutes as "one of the cornerstones of [its] prosecution efforts." Counterterrorism White Paper, Counterterrorism Section, Dep't of Justice (June 22, 2006) at 14, *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf; *see also* September 11, 2008 DOJ Fact Sheet #08-807: Justice Department Counterterrorism Efforts Since 9/11, *available at* http://www.justice.gov/opa/pr/2008/September/08-nsd-807.html (last visited Dec. 19, 2009) (emphasizing that Section 2339B "form[s] a critical component of the [DOJ's] overall terrorist prosecutorial efforts, allowing prosecutors to target the provision of support, resources and other assistance to terrorists and to intervene during early stages of terrorist planning").

As the Solicitor General explains, since 2001, approximately 150 defendants have been charged with, and 75 defendants convicted of, violating Section 2339B. *See* Resp't Br. 53. Another source reports that "the two material support charges [§ 2339A and § 2339B] account for 71% of all convictions under the core terrorism statutes." The Center on Law & Security, New York University School of Law, Terrorist Trial Report Card: September 11, 2008, *available at* http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf (last visited Dec. 19, 2009); *see also* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 28, Human Rights First (May 2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (reporting, on the basis of a compilation of cases, that "[b]y far the most commonly charged substantive offenses in our data set [of terrorism-related convictions] are the material support statutes").

By way of specific example, individuals successfully prosecuted under Section 2339B include:

- American John Walker Lindh, who pleaded guilty to Section 2339B and other charges for fighting alongside the Taliban in Afghanistan. *See generally United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).
- A group of men from Buffalo, New York, known as the "Lackawanna Six," who pleaded guilty to violating Section 2339B for their par-

ticipation in an al Qaeda affiliated training camp. *See generally* Press Release, Dep't of Justice, Examples of Terrorism Convictions Since September 11, 2001 (June 23, 2006), *available at* http://www.justice.gov/opa/pr/2006/June/06_crm_389.html.

- Uzair Paracha, who was convicted of violating Section 2339B for helping an al Qaeda member obtain immigration documents to permit his re-entry into the United States to carry out terrorist attacks. *See id.*
- Iyman Faris, who pleaded guilty to violating, among other statutes, Section 2339B, for providing material support to al Qaeda in the form of information about targets within the United States. *See id.*

The Department of Justice continues to reaffirm the importance of Section 2339B with new and significant prosecutions, including these pending cases announced in recent months:

- Chicago resident David Coleman Headley faces charges for violating, among other statutes, Section 2339B for his alleged involvement in the 2008 attacks in Mumbai, India, which killed 170 people. *See generally* Press Release, Dep't of Justice, Chicagoan Charged with Conspiracy in 2008 Mumbai Attacks in Addition to Foreign Terror Plot in Denmark (Dec. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-nsd-1304.html.
- Ten individuals have been indicted for violating Section 2339B, among other statutes, for allegedly providing weapons and stolen and counterfeit currency to Hezbollah. *See general-*

ly News Release, U.S. Immigration and Customs Enforcement News, Indictment Charges 4 with Conspiracy to Support Hezbollah 6 Others Charged with Related Crimes (Nov. 24, 2009), *available at* http://www.ice.gov/pi/nr/0911/091124philadelphia.htm.

The Department of Justice's robust past and present reliance on Section 2339B demonstrates the statute's importance to the Executive Branch's ongoing efforts to combat and prevent international terrorism.

III. FEDERAL CRIMINAL PRACTICE PROVIDES SAFEGUARDS TO PROTECT DEFENDANTS' FIRST AMENDMENT RIGHTS IN SECTION 2339B MATERIAL SUPPORT PROSECUTIONS.

Reversing the Ninth Circuit's holding will not leave defendants facing Section 2339B charges without means to protect their First Amendment rights. To the contrary, there are certain mechanisms in place in federal practice to provide sufficient assurance that protected speech and conduct does not lead to criminal liability in individual prosecutions. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 622 (1973) (stating that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied") (citation omitted).

Congress understood this point and took care in enacting Section 2339B to reinforce the message by expressly stating that the statute shall not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." 18 U.S.C. § 2339B(i). A beginning point, then, must be this Congressional vision that Section 2339B and the

First Amendment are fully capable of coexisting in the Executive Branch's ongoing efforts to thwart the flow of material support to FTOs.

Evidencing its understanding of and adherence to this precept, the Department of Justice has established mechanisms to require advance review and approval of charging decisions related to international terrorism matters proposed by a particular United States Attorney. *See* Dep't of Justice, U.S. Attorneys' Manual Title 9, Criminal Resource Manual § 9-2.136, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136 (last visited Dec. 19, 2009). With respect to charges brought pursuant to the material support (and other terrorism-related) statutes, "*[p]rior express approval* of the Assistant Attorney General of the National Security Division (AAG) or his designee" must be obtained to "fil[e] a criminal complaint or information or seek[] the return of an indictment." *See id.* § 9-2.136H.

At the very least, these approval processes help to ensure proper applications of Section 2339B, as prosecutors and other Department of Justice officials are duty bound to respect and uphold the constitutional rights of defendants. To be sure, difficult cases may arise that press the outer boundary of the relationship between Section 2339B and the First Amendment. If the government chooses to move forward with charges in such a case, ample means exist for defendants to challenge the charging decision.

Rule 12 of the Federal Rules of Criminal Procedure permits defendants believing that particular criminal charges infringe upon their First Amendment rights to move to dismiss those charges. *See*

Fed. R. Crim. P. 12(b); *United States v. Syring*, 522 F. Supp. 2d 125, 128-35 (D.D.C. 2007) (conducting a First Amendment analysis in connection with a motion to dismiss an indictment under Rule 12); *see also United States v. Bly*, 510 F.3d 453, 459 (4th Cir. 2007) (affirming the denial of a motion to dismiss an indictment raising a potential First Amendment issue). Indeed, defendants' ability to move to dismiss an indictment on the ground that the charged conduct is protected by the First Amendment is commonplace enough that the United States Attorneys' Manual provides a sample response to such a motion. *See* Dep't of Justice, U.S. Attorneys' Manual Title 8, Civil Rights Resource Manual § 8.142, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title8/cvr00142.htm (last visited Dec. 19, 2009).

A motion to dismiss is of legal significance, as it triggers judicial scrutiny of specific charges and thus an independent assessment by the trial judge of whether a conviction under the precise allegations at issue would impermissibly criminalize protected speech. The recent prosecution of attorney Lynne Stewart in New York demonstrates the point. An indictment alleged, among other things, that Stewart violated Section 2339B by providing material support in the form of "communications equipment" and "personnel" to convicted terrorist Sheikh Omar Ahmad Ali Abdel Rahman, known as the "Blind Sheikh." *See United States v. Sattar*, 272 F. Supp. 2d 348, 357 (S.D.N.Y. 2003). Stewart moved to dismiss those charges on the ground that the application of Section 2339B to her was unconstitutionally vague and thus risked criminalizing protected speech. The district court agreed and dismissed the charge on an as-applied basis. *See id.* at 361.

While Stewart ultimately was convicted under a separate material support statute, 18 U.S.C. § 2339A, among other statutes, the case provides apt illustration of a defendant using a motion to dismiss to challenge specific charges on constitutional grounds. Other cases reinforce the same point—that a mechanism exists for defendants to challenge applications of the material support statutes that they believe infringe upon their First Amendment rights. *See, e.g.*, *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 168 (E.D.N.Y. 2008) (upholding an indictment that charged the defendant with violating Section 2339B against a motion to dismiss based on a First Amendment defense because the defendant was "not being charged with *mere association*"); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1013-16 (D. Minn. 2008) (same); *accord United States v. Afshari*, 426 F.3d 1150, 1161 (9th Cir. 2005) (reversing trial court's dismissal of indictment on First Amendment grounds).

Yet another safeguard exists within the trial itself in that a criminal defendant is entitled to a jury instruction on a First Amendment defense if there is sufficient evidence for a reasonable jury to find in his favor on that defense. *Cf. Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."); *see also United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) ("A First Amendment defense is warranted if there is evidence that the speaker's purpose or words are mere abstract teaching of the moral propriety of opposition to the [challenged] law.") Indeed, a defendant is able to request that the trial judge instruct the jury on the basic contours of the defendant's First Amendment rights and, more specifically, that it must acquit the defendant if it finds that the challenged conduct in fact is protected speech.

In an opinion by then-Judge Kennedy, the Ninth Circuit explained that where the trial record contains "some evidence" that "the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration." *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985). In *Freeman*, the Ninth Circuit reversed particular convictions because, "[i]n light of [defendant] Freeman's defense and the evidence to support it, an instruction based upon the First Amendment should have been given to the jury." *Id.* at 552.

Courts have applied these teachings in recent terrorism prosecutions. For example, in *United States v. Rahman*, the Second Circuit explained that

> Judge Mukasey properly protected against the danger that [the defendant] might be convicted because of his unpopular religious beliefs that were hostile to the United States. He explained to the jury the limited use it was entitled to make of the material received as evidence of motive. He instructed that a defendant could not be convicted on the basis of his beliefs or the expression of them--even if those beliefs favored violence.

189 F.3d 88, 118 (2d Cir. 1999). Likewise, the jury was provided an instruction about protected conduct in the prosecution of Manhattan criminal defense attorney Lynne Stewart. In relevant part, the instruction provided:

> Expression of opinion alone, opinion in the sense of a point of view, even an opinion advocating violence, is not a crime in this country. The United States Constitution guarantees that people may advocate the use of force, or even the moral necessity for a resort to force and violence, without fear of punishment by the government so long as that advocacy is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. But evidence of defendant Lynne Stewart's statements on political, public or religious issues may be considered by you if you find them relevant [as evidence of the purpose of her actions and whether she acted in accordance with her opinions].

Transcript of Judge's Instructions and Charge to the Jury, *United States v. Sattar*, No. S102CR395, 2005 WL 6177268, at *21 (S.D.N.Y. Jan. 12, 2005).

As these cases demonstrate, a so-called protected conduct jury instruction—especially applied against the independent constitutional requirement of proof beyond a reasonable doubt—operates to provide important and sufficient protection of First Amendment rights in Section 2339B prosecutions. *Cf. United States v. Williams*, 128 S. Ct. 1830, 1846

(2008) (emphasizing that "close cases" should be addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt").

Another protection for defendants exists in the form of a judgment of acquittal, including under Rule 29 of the Federal Rules of Criminal Procedure. The Rule and federal criminal practice generally permit a judgment of acquittal at the close of the government's evidence or after an adverse jury verdict. Through this means, a defendant can trigger additional judicial scrutiny of First Amendment issues by arguing that there is insufficient evidence to sustain a conviction because the "material support" allegedly provided to an FTO was "protected speech" for which he may not be prosecuted. *See e.g., United States v. Sattar,* 395 F. Supp. 2d 79, 99-103 (S.D.N.Y. 2005), *aff'd,* No. 06-5015, 2009 WL 3818860 (2d Cir. Nov. 17, 2009, amended Dec. 23, 2009); *Taleb-Jedi,* 566 F. Supp. 2d at 168 (stating that "should the Government not deliver on its representation of what the evidence will show, and the proof at trial shows mere association, the Government's case may not be allowed to go to the jury or any guilty verdict based on mere association may be set aside"). Notably, Rule 29 itself permits a trial judge to address such First Amendment concerns *sua sponte. See* Fed. R. Crim. P. 29(a) ("The court may on its own consider whether the evidence is insufficient to sustain a conviction.")

As yet another protection, defendants may appeal an adverse jury verdict on First Amendment grounds. *See, e.g., Rahman,* 189 F.3d at 116-18 (rejecting defendant's First Amendment defense in affirming his conviction); *United States v. Hammoud,* 381 F.3d 316, 329 (4th Cir. 2004) (en banc) (rejecting the defendant's First Amendment defense to Section

2339B conviction on plain error review because "§ 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO") (emphasis in original), *vacated on other grounds*, 543 U.S. 1097 (2005); *see also Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (reversing convictions upon finding that "[t]he ordinance before us makes a crime out of what under the Constitution cannot be a crime"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (reversing a communist party member's conviction for violating the Smith Act and instructing that the act must be construed to prevent a defendant from being "punished for his adherence to lawful and constitutionally protected purposes").

Noteworthy, too, as a protective mechanism is the one Congress provided in Section 2339B(j). This provision allows individuals desiring to provide particular support to an FTO to eliminate any risk of prosecution by first vetting the planned support with the Secretary of State and receiving her approval. *See* 18 U.S.C. § 2339B(j). HLP provides no indication in its brief that it has attempted to avail itself of this safeguard.

IV. THE NINTH CIRCUIT'S REASONING IS FLAWED AND WOULD SIGNIFICANTLY LIMIT NECESSARY COUNTERTERRORISM EFFORTS.

The Ninth Circuit's decision, as the Solicitor General's brief demonstrates, confused and misapplied established vagueness and overbreadth doctrine in invalidating Section 2339B. Indeed, it is difficult to read the Ninth Circuit's vagueness reasoning and not conclude that the court was searching (in ways akin to facial analysis of a statute) for hypothetical unconstitutional applications of Section

2339B. Not only does this approach offend this Court's teachings regarding proper vagueness and overbreadth analysis, it also runs afoul of important constitutional avoidance principles. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (outlining constitutional avoidance principles). The canon of constitutional avoidance takes on added importance where, as here, vagueness and overbreadth challenges arise in the national security setting—an area where respect for legislative prerogatives should be at its apex. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.")

The Ninth Circuit's decision raises more than legal doctrinal concerns. The decision threatens elimination of the Department of Justice's ability to prosecute individuals for providing a "service," "training," or "expert advice or assistance" in the form of "specialized knowledge" to an FTO. Furthermore, the ramifications of the Ninth Circuit's holding extend beyond Section 2339B to Section 2339A, as both provisions largely depend upon the same definitions challenged here by HLP.

If permitted to stand, the Ninth Circuit's decision risks grave consequences to the Executive Branch's ongoing efforts to deprive FTOs of resources requisite to their violent missions. Section 2339B is unique in the Federal Criminal Code because it permits the Executive Branch to stop the flow to FTOs of seemingly innocuous or facially neutral resources, which are capable of being provided without knowledge or intent to facilitate a specific terrorist act. This stoppage, in turn, prevents terrorists from reallocating funds to further terrorism, either because the resource is fungible or because it has multiple potential applications.

Under the Ninth Circuit's ruling, the cases falling beyond the ambit of Section 2339B, or at the very least called into serious question, would be many. FTOs could receive services, training, or expert advice or assistance with respect to the following:

- flying of airplanes and driving trains;
- design of large metropolitan subway systems, including their ventilation apparatus;
- distribution of food, water, and electricity in large urban areas;
- protocols of the United States Secret Service;
- construction, storage, and transport of mass shipping containers; or
- survival techniques.

With respect to each example, it is possible to suggest circumstances in which the support would not be connected to a particular terrorist plot, but rather to a purported innocuous purpose, such as increasing the emergency and disaster preparedness of a community for which an FTO serves as the *de facto* government; improving the distribution of essential humanitarian resources; advancing the development of critical infrastructure in a particular geographic location; or strengthening certain security measures. On the other hand, it is far easier to take each example and instantly envision the same conduct being undertaken to further a specific terrorist plot. Section 2339B exists to avoid the latter risk: Congress put the statute in place to prevent international terrorist organizations from receiving particular forms of support capable of turning lethal before the Department of Justice is able to step in with a preventative prosecution.

Even the provision of the following less specific forms of support could raise grave national security concerns in particular circumstances:

- language translation;
- internet use;
- mechanical repairs;
- long-range photography and videography; or
- physical fitness and self-defense.

In each instance, the support at issue—while perhaps intended to aid an FTO's non-violent activity—is also capable of being used to advance the FTO's violent mission. These forms of support, as with many others, have dual uses and are sufficiently fungible to warrant Congressional prohibition in the name of protecting our national security.

The irony of the Ninth Circuit's ruling is that the court itself, in the course of rejecting HLP's overbreadth challenge, best summed up the grave consequences of curtailing the intended reach of Section 2339B: "Were we to restrain the government from enforcing section 2339B(a) that prohibits individuals in the United States from providing 'material support or resources' to [FTOs], we would potentially be placing our nation in danger of future terrorist attacks." *Humanitarian Law Project*, 552 F.3d at 932. These risks are real and persistent. As President Obama recently reminded the nation, "[t]his is no idle danger, no hypothetical threat. In the last few months alone, we have apprehended extremists within our borders who were sent here from the border region of Afghanistan and Pakistan to commit new acts of terror." President Barack Obama, Remarks to the Nation on the Way Forward in Afghanistan & Pakistan (Dec. 1, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan.

In the end, then, this case is not one where individual liberty and national security are at odds. Federal practice includes established mechanisms to protect First Amendment interests on an as-applied basis within an individual prosecution, and the Executive Branch has created additional safeguards to ensure respect for protected speech. It is only the Ninth Circuit's decision that fails without constitutional justification to respect the balance between liberty and security by invalidating essential aspects of a critical counterterrorism tool regularly relied upon by the Department of Justice.

CONCLUSION

For these reasons, and those articulated in the Solicitor General's brief, this Court should reverse in part the Ninth Circuit and hold that Section 2339B is neither vague nor overbroad.

Dated: December 28, 2009 Respectfully Submitted,

Anthony S. Barkow
David B. Edwards
Center on the Administration of Criminal Law
110 West Third Street,
Suite 214
New York, New York 10012
(212) 998-6612

Michael Y. Scudder, Jr.
Counsel of Record
Patrick M. Crook
Courtney E. VanLonkhuyzen
Skadden, Arps, Slate,
Meagher & Flom LLP
155 North Wacker Drive
Chicago, Illinois 60606-1720
(312) 407-0700

Counsel For Amicus Curiae Center on The Administration of Criminal Law

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED

NOV 2 3 2009

OFFICE OF THE CLERK

146 ⑩ ⑦

Nos. 08-1498 & 09-89

In the Supreme Court of the United States

ERIC HOLDER, ATTORNEY GENERAL, ET AL.,

Petitioners / Cross-Respondents,

v.

HUMANITARIAN LAW PROJECT, ET AL.,

Respondents / Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

SHARON BRADFORD FRANKLIN
The Constitution Project
1200 18th Street NW
Washington D.C. 20036
(202) 580-6920

JOHN W. WHITEHEAD
Rutherford Institute
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

DAVID M. GOSSETT
Counsel of Record
MICHAEL B. KIMBERLY*
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

**Admitted in Maryland only; practicing under supervision pursuant to D.C. App. Rule 49(c)(8).*

Counsel for the Amici Curiae

TC47A
595265

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

936b

38

QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether the provisions of the Antiterrorism and Effective Death Penalty Act that prohibit providing "service," "training," "expert advice," and "personnel" to designated terrorist organizations (18 U.S.C. §§ 2339A, 2339B) should be severed from the statute as unconstitutionally overbroad because they directly criminalize and incidentally chill a substantial range of protected speech and association.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 8

The "Service," "Training," "Expert Advice," And "Personnel" Provisions Of The Material Support Bar Are Unconstitutionally Overbroad 8

- A. The material support law is overbroad as written 9
  - 1. The material support bar's burdens upon protected speech and association are substantial 10
  - 2. The range of legitimate applications of the challenged provisions is comparatively narrow 15
- B. The material support law is overbroad in actual fact 20

CONCLUSION 25

APPENDIX: Members of the Constitution Project's Liberty and Security Committee Endorsing the Report: *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to Terrorist Organizations* 27

TABLE OF AUTHORITIES

Page(s)

CASES

Bartnicki v. *Vopper*,
532 U.S. 514 (2001) 13
Boos v. *Barry*,
485 U.S. 312 (1988) 9
Boumediene v. *Bush*,
128 S. Ct. 2229 (2008) 5
Boy Scouts v. *Dale*,
530 U.S. 640 (2000) 18
Brandenburg v. *Ohio*,
395 U.S. 444 (1967) 18
Broadrick v. *Oklahoma*,
413 U.S. 601 (1973) .... passim
Brockett v. *Spokane Arcades*,
472 U.S. 491 (1985) 17, 22
California Democratic Party v. *Jones*,
530 U.S. 567 (2000) 13
Clingman v. *Beaver*,
544 U.S. 581 (2005) 13
De Jonge v. *Oregon*,
299 U.S. 353 (1937) 5
Dombrowski v. *Pfister*,
380 U.S. 479 (1965) 8
First Nat'l Bank v. *Bellotti*,
435 U.S. 765 (1978) 9
Gooding v. *Wilson*,
405 U.S. 518 (1972) 8
Hamdan v. *Rumsfeld*,
548 U.S. 557 (2006) 3
Hill v. *Colorado*,
530 U.S. 703 (2000) 13

TABLE OF AUTHORITIES—continued

Page(s)

Humanitarian Law Project v. *Reno*,
205 F.3d 1130 (9th Cir. 2000)................................12
Legal Servs. Corp. v. *Velazquez*,
531 U.S. 533 (2001)..12
McIntyre v. *Ohio Elections Comm'n*,
514 U.S. 334 (1995)..11, 13
Munaf v. *Geren*,
128 S. Ct. 2207 (2008)..3
New York State Club Ass'n, Inc. v.
City of New York, 487 U.S. 1 (1988)........6, 9, 19, 24
New York v. *Ferber*,
458 U.S. 747 (1982)..............................8, 10, 14, 19
Rasul v. *Bush*,
542 U.S. 466 (2004)..3
Regan v. *Taxation With Representation*,
461 U.S. 540 (1983)..11
Scales v. *United States*,
367 U.S. 203 (1961)..18
United States v. *Christian Echoes Nat'l*
Ministry, Inc., 404 U.S. 561, 565 (1972)
(per curiam)..16
United States v. *Jackson*,
390 U.S. 570 (1968)..17
United States v. *Kaczynski*,
551 F.3d 1120 (9th Cir. 2009)................................17
United States v. *Salerno*,
481 U.S. 739 (1987)..16
United States v. *Sattar*,
272 F. Supp. 2d 348 (S.D.N.Y. 2003) 6, 20

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Sattar*,
No. 06-5015, 2009 WL 3818860
(2d Cir. Nov. 17, 2009) 21
United States v. *Williams*,
128 S. Ct. 1830 (2008) 8, 10, 18
Vill. of Schaumburg v. *Citizens for a Better Env't*, 444 U.S. 620 (1980) 8, 9
Virginia v. *Hicks*,
539 U.S. 113 (2003) .... passim
Whitney v. *California*,
274 U.S. 357 (1927) 11

STATUTES

8 U.S.C. § 1189 .... 4, 12
8 U.S.C. § 1189(a)(1) 4
8 U.S.C. § 1189(d)(2) 4
18 U.S.C. § 2339A(b) 4, 11, 13, 14
18 U.S.C. § 2339A(b)(3) 10, 14
18 U.S.C. § 2339A(b)(1) 4, 10, 13, 14
18 U.S.C. § 2339B 19, 25
18 U.S.C. § 2339B(a)(1) 14
18 U.S.C. § 2339B(b) 14
18 U.S.C. § 2339B(h) 11, 12
18 U.S.C. § 2339C 19, 25

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (8th ed. 2004) 10
The Center on Law and Security, N.Y.U. Sch. of Law, *Terrorist Trial Report Card: September 11, 2008* (2008), available at http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf. 23

TABLE OF AUTHORITIES—continued

Page(s)

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 271 (1994) 17

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996) 10, 13

Susan Schmidt, *Saudi Acquitted of Internet Terror*, WASH. POST, June 11, 2004 .... 6, 20

Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, Dec. 23, 2008 20

The Constitution Project, *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations"*, (2009), available at www.constitutionproject.org/manage/file/355.pdf 2, 24

The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations* (2008), available at www. constitutionproject.org/manage/file/48.pdf 2

The Constitution Project, *Report of the Liberty and Security Initiative on First Amendment Issues* (2003), available at www.constitutionproject.org/pdf/First_Amendment_Report.pdf 1

BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus the Constitution Project (the Project) is an independent, nonprofit organization that brings together legal and policy experts from across the political spectrum to promote and defend constitutional safeguards. After the tragic events of September 11, 2001, the Project created its Liberty and Security Committee (the Committee), a blue-ribbon, bipartisan committee of prominent Americans, to address the importance of preserving civil liberties as we work to enhance our Nation's security. The Committee develops policy recommendations on issues such as U.S. policies for prosecuting suspected terrorists and governmental surveillance, and emphasizes the need for all three branches of government to play a role in preserving constitutional rights.

Since 2003, following the release of the Committee's *Report on First Amendment Issues*,[2] the Project has focused on urging the government to formulate counter-terrorism measures that promote openness, robust political dialogue, and freedom of association. For example, in its 2008 report *The Use and Abuse of Immigration Authority as a Counterterrorism Tool*, the Committee condemned the application of the material support laws in the immigration context in ways that impinge on free speech rights. The committee explained that "[d]eporting and excluding people for their political views and affiliations undermines fundamental First Amendment principles." *Id.* at 12.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for respondents, David Cole, is co-chair of the Constitution Project's Liberty and Security Committee, but this brief has been drafted entirely by outside counsel and staff for *amici*, and Mr. Cole has neither drafted this brief in whole or in part nor has he provided any monetary assistance for its preparation. The parties have submitted letters to the clerk granting blanket consent to the filing of *amicus* briefs.

[2] This and all other Committee and Project publications dis-

In November 2009, the Committee issued a statement, *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations."* In it, the Committee analyzed how, in their current form, the material support laws raise serious constitutional issues under the First, Fourth, and Fifth Amendments. The bipartisan group of signers (listed in the appendix to this brief) recognized that "cutting off support of terrorist activity is an important and legitimate part of the United States' counter-terrorism strategy," but urged that, "in providing the legal authority to prohibit and punish such conduct, it is essential that the law respect constitutional freedoms." *Id.* at 1. In particular, the Committee condemned the application of the material support laws to criminalize pure speech—and especially speech that is intended to further only lawful, peaceful, and nonviolent activities.

---

cussed in this brief are available on the Project's web site, *www.constitutionproject.org*; specific web addresses are provided in the table of authorities.

Amicus The Rutherford Institute is an international civil liberties organization that was founded in 1982 by John W. Whitehead, who remains its President. The Rutherford Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 27-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Rutherford Institute has also filed *amicus* briefs in numerous cases dealing with critical constitutional issues arising from the current efforts to combat terrorism, including *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), and *Rasul* v. *Bush*, 542 U.S. 466 (2004).

This case is of considerable importance to both *amici*, each of which has worked diligently to preserve the principles of free expression placed in jeopardy by the material support bar. Both *amici* recognize that a balance can and must be struck between the government's pursuit of national security and the Constitution's protection of free speech and association. The *amici* accordingly are filing this brief to assist the Court in its consideration of the important First Amendment issues presented by this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords the Court a much-needed opportunity to clarify the constitutional limits on Congress's power to forbid American citizens from advocating on behalf of and directly participating in organizations the government deems a threat to the national security.

The so-called "material support bar" prohibits anyone from providing, in relevant part, "service, * * * training, expert advice or assistance, * * * [or] personnel [including 'oneself']" (18 U.S.C. § 2339A(b)(1)) to any group "designated as a terrorist organization" (18 U.S.C. § 2339B(g)(6)). The Secretary of State is authorized to designate any foreign group as a "terrorist organization" if she, in her sole discretion, finds that "the organization engages in terrorist activity or terrorism, or retains the capability and intent to engage in terrorist activity or terrorism" and "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(d)(2) (parentheticals omitted).

The term "terrorist activity" is broadly defined to include virtually any unlawful use of, or threat to use, a weapon against person or property. The only exception from this definition of terrorism is unlawful use of or threats to use a weapon for mere personal monetary gain. "National security" is also broadly defined to mean the "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(a)(1).

So conceived, the material support bar is extraordinarily broad—it prohibits (among other things) association with, advocacy on behalf of, legal advice to, and humanitarian aid for any group unilaterally deemed by the government to be a threat to U.S. national defense, foreign relations, or economic interests. It is doubtful that any law of the United States has so expansively limited citizens' rights to speech and association since the Alien and Sedition Acts of 1798.

To be sure, limiting financial and other support of terrorist activities is an important and legitimate element of the government's counter-terrorism strategy. Congress and the President should have the tools necessary to apprehend and punish not just terrorist leaders, but also those who work to facilitate and enable acts of terrorism. But the government's national-security prerogatives are not the only weighty constitutional values at stake in the fight against terrorism: While "[s]ecurity depends upon a sophisticated intelligence apparatus," it "subsists, too, in fidelity to freedom's first principles" (*Boumediene* v. *Bush*, 128 S. Ct. 2229, 2277 (2008)), including the protection of free expression critical to the maintenance of our democratic society. As this Court explained long ago:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. *Oregon*, 299 U.S. 353, 365 (1937).

In Section A of this brief, we explain how the "service," "training," "expert advice," and "personnel" provisions of the material support bar are unconstitutionally overbroad, overtly encroaching upon the freedoms guaranteed by the First Amendment. There is simply no disputing, for example, that provisions of the material support bar criminalize pure speech and pure association in a content-sensitive manner. These restrictions are so broadly written, moreover, that they even apply to speech or conduct intended to *reduce* a group's resort to violence, and even when that speech or conduct can be shown to have precisely this beneficial effect. Thus the substantial overbreadth of the material support bar's challenged provisions, set against the comparatively narrow range of legitimate applications not covered by the remainder of the law's provisions, exceeds well-defined constitutional limits.

To support facial invalidation, however, a law must be overbroad, not just in its "'text,'" but also in "'actual fact'" *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003) (quoting *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988)). In Section B, we therefore show that the direct burdens and chilling effect upon free expression in this case are not abstract legal hypotheses: to the contrary, the material support bar is having a real and serious impact on free expression throughout the nation. Recognizing that prosecutions under the challenged terms can burden free expression, district courts have dismissed certain elements of indictments (see *United States* v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003)) or issued limiting jury instructions (see Susan Schmidt, *Saudi Acquitted of Internet Terror*, WASH. POST, June 11, 2004, at A3). And in this very case, the government has defended application of the material support bar to prohibit a U.S. human rights group's efforts to provide training in human rights advocacy and assistance in peacemaking to a designated group. Not only are these applications themselves at loggerheads with the First Amendment, but—especially given the frequency with which federal prosecutors are using the material support bar—there is simply no doubt that these provisions are preventing others from exercising their rights to free speech and association, for fear of similar prosecution.

Thus while *amici* fully agree with the Humanitarian Law Project and the other respondents/cross-petitioners (collectively HLP) that the terms of the material support bar are unconstitutionally vague—an independently sufficient ground for holding the material support bar to be unconstitutional as applied to the HLP—we argue that the Court can and should go further. The "service," "training," "expert advice," and "personnel" provisions of the material support bar are so fundamentally in conflict with traditional First Amendment protections that they directly criminalize and are inevitably chilling wide swaths of constitutionally protected speech and association. Accordingly, not only should this Court affirm that portion of the court of appeal's decision holding the material support bar unconstitutional as applied, it should sever the law's overbroad provisions as facially unconstitutional.[3]

---

[3] This argument has been fully preserved for review and is addressed in the parties' briefing before this Court. See HLP Br. at 42–43.

ARGUMENT

The "Service," "Training," "Expert Advice," And "Personnel" Provisions Of The Material Support Bar Are Unconstitutionally Overbroad.

This Court has long recognized that certain laws directed at concededly legitimate ends can, by virtue of an "overbroad" reach, threaten protected speech and association in a way that unconstitutionally "chills" free expression. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611–12 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). The overbreadth doctrine "is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" *New York* v. *Ferber*, 458 U.S. 747, 768–69 (1982) (quoting *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972), and citing *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). Thus the concept of chilling follows from "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

Whether overbreadth warrants invalidating a law or regulation depends on a balancing of the costs "in permitting some unprotected speech to go unpunished" against "the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of [the] overly broad statute[]." *Broadrick*, 413 U.S. at 612; see also *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008) ("The [overbreadth] doctrine seeks to strike a balance between competing social costs.") (citing *Hicks*, 539 U.S. at 119–20).

In setting these two concerns against one another, the Court should invalidate any law whose overreach is both "real [and] substantial * * *, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The law's overreach must be clear, in other words, "'from the text of [the statute] and from actual fact.'" *Hicks*, 539 U.S. at 122 (quoting *New York State Club Ass'n*, 487 U.S. at 14). Both of these conditions—overbreadth in law and overbreadth in fact—is manifestly present here.

A. The material support law is overbroad as written.

This Court has been most willing to strike down laws under the First Amendment when the government attempts to regulate pure speech on the basis of its content. See, *e.g.*, *Boos* v. *Barry*, 485 U.S. 312 (1988); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978). Thus a statute's overbreadth is most likely to be "substantial" in the context of laws directly regulating "spoken words." *Broadrick*, 413 U.S. at 612.

The overbreadth of the material support statute's "service," "training," "expert advice," and "personnel" provisions is plainly "substantial," both standing alone and when judged against their legitimate ends. First, as we explain in Section 1, these provisions are directed at pure speech and pure association; they also draw distinctions between permissible and impermissible conduct based on content. Accordingly, the terms at issue here are precisely the kind of direct government incursion upon free expression this Court has previously concluded chills large categories of constitutionally protected conduct. See, *e.g.*, *Vill. of Schaumburg*, 444 U.S. at 633–34.

Second, as we show in Section 2, the overreach of the challenged portions of the law must be set against the relatively narrow range of situations in which these provisions may legitimately be applied. To be sure, the government has a critical interest in inhibiting support of terrorist organizations, but the range of conduct legitimately prohibited by the challenged provisions is dwarfed in comparison with the vastness of those provisions' overbreadth. The challenged provisions of the material support bar are, in short, substantially overbroad.

1. The material support bar's burdens upon protected speech and association are substantial.

It is well settled that a statute's overbreadth will render it "invalid if it prohibits a *substantial* amount of protected speech." *Williams*, 128 S. Ct. at 1838 (emphasis added). Overbreadth is most likely to be substantial when the statute burdens "pure" speech and "pure" association (*Broadrick*, 413 U.S. at 615–16), and particularly when the law imposes grave criminal consequences (*Ferber*, 458 U.S. at 773). The relevant portions of the material support bar regulate speech in precisely such an impermissible way.

1. The material support bar burdens pure speech and pure association. By its terms, the law prohibits anyone from providing designated organizations with "service" (§ 2339A(b)(1)) or "expert advice * * * derived from scientific, technical or other specialized knowledge" (§ 2339A(b)(3)). In ordinary usage, *to give advice* means to provide "recommendations" or "information," while *service* means "the act of furnish-

ing" something "useful" or "desired." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 18, 1070 (10th ed. 1996); see also BLACK'S LAW DICTIONARY 59, 1399 (8th ed. 2004) (defining "advice" as "[g]uidance offered by one person * * * to another" and "service" as "[t]he act of doing something useful for a person or company for a fee"). These two extremely broad terms would therefore encompass virtually any kind of speech-based interaction with a designated group, including human-rights counseling and political consultation or advocacy. Thus, for example, the material support bar's "service" provision appears to prohibit any individual from lobbying the Secretary of State to reconsider her designation of a group as a terrorist organization, even though this Court has held that political lobbying is protected by the First Amendment. See *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983).

The law's impermissible reach extends beyond advocacy on behalf of designated organizations. For instance, the statute prohibits "training * * * designed to impart a specific skill" (§ 2339A(b)), which ostensibly covers a broad range of pure speech activity, such as any effort to instruct or teach professional skills—even training intended to *reduce* the designated group's reliance on violence, as in this very case. This Court has affirmed that the First Amendment protects "'the right to teach'" (*McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) (quoting *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)); the material support bar's training provision nevertheless appears to prohibit human rights workers from providing any designated organization with any training whatsoever, even in peaceful dispute resolution.

The "personnel" provision also directly burdens pure speech. It forbids anyone from "work[ing] under [a] terrorist organization's direction or control" (§ 2339B(h)), and would encompass virtually any sort of legal or political consultation. The personnel provision thus forbids lawyers retained by designated organizations from following their client's instructions in the course of their advocacy on their clients' behalves, despite this Court's instruction that attorneys have a First Amendment right to advocate on behalf of their clients, unfettered from government interference and regardless who their clients might be (*Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 536 (2001)). See, *e.g.*, *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) ("Someone who advocates the cause of [a designated group] could be seen as supplying them with personnel.").

Because the "personnel" provision also prohibits providing personnel to designated organizations, "including oneself" (§ 2339B(h)), the material support bar also categorically forbids pure association with any designated group. Of particular note, the personnel provision does not include an express *scienter* element requiring the individual to share or act with the organization's intent to commit terrorism; it therefore appears to punish pure association without more.[4] The material support bar's prohibition of joining any political party unilaterally designated by the Secretary of State to be a terrorist threat to U.S. security, diplomatic, or economic interests (8 U.S.C. § 1189) accordingly appears in clear conflict with this Court's holding that "the First Amendment, among other things, protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views'" (*Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005) (quoting *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)).

---

[4] Earlier in this litigation, the Ninth Circuit concluded that the personnel clause does not criminalize pure association because it "does not prohibit being a member of one of the designated groups," and instead prohibits only "the act of giving material support." *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000). The purported distinction between "giving material support" and "being a member" of a designated group is utterly meaningless—the point is that the former con-

In these ways, the material support bar indisputably burdens pure speech and pure association. As this Court has reiterated time and again, such "regulation[s] of pure speech" (*McIntyre*, 514 U.S. at 345) must be treated with special skepticism by the courts. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 527–28 (2001).

2. It is equally clear that the burdens on speech and association from the "service," "training," "expert advice," and "personnel" provisions are content sensitive. A statute is content sensitive if "the content of the speech * * * determines whether it is within or without the statute's blunt prohibition." *Carey* v. *Brown*, 447 U.S. 455, 462 (1980). Thus, as Justice Kennedy has said, "a statute of broad application is not content neutral if its terms control the substance of a speaker's message." *Hill* v. *Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting).

---

sists, in part, of the latter. No matter whether one calls it "material support" or "bananas," providing "oneself" as "personnel" equates with pure association.

The material support bar does just that: First, individuals are prohibited from providing material support unless such support falls within two narrow categories: "medicine or religious materials." 18 U.S.C. § 2339A(b)(1). "Medicine" is "the science and art dealing with the maintenance of health and the prevention, alleviation, or cure of disease." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 722 (10th ed. 1996). Thus it seems that a lawyer's provision of legal services is prohibited, whereas a doctor's provision of medical services is not. Similarly, individuals are also prohibited from proving any "property" or "service[s]" of any kind, unless such property or services constitute "religious materials." 18 U.S.C. § 2339A(b)(1). Accordingly, a human rights worker's political aid is prohibited, whereas a priest's religious aid is not.

Second, expert advice is also impermissible only insofar as it derives from "scientific, technical, or other specialized knowledge," but not general knowledge. 18 U.S.C. § 2339A(b)(3). Thus advice from a political consultant concerning "specialized knowledge" of localized political conditions is prohibited, whereas advice in "general" political principles is not. Under these circumstances, the content of speech and conduct plainly determines whether it falls within or without the material support bar's prohibition.

3. Finally, the material support bar imposes grave criminal consequences upon its violators. This Court has explained that when the regulation at issue is "a criminal prohibition," the "penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." *Ferber*, 458 U.S. at 773. Here, the consequences of running afoul of the

material support bar are enormously burdensome. "[K]nowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so" is enough—*without more*—to subject an individual to fifteen years imprisonment and a fine of $50,000. 18 U.S.C. § 2339B(a)(1), (b). The likelihood, therefore, that the material support bar will chill protected speech falling (or even only *possibly* falling) within its broad and dangerous scope is very great.

In short, there is simply no denying that the law's "service," "training," "expert advice," and "personnel" provisions are content-based restrictions upon pure speech and pure association. The scope of these restrictions is, moreover, extraordinarily expansive, reaching a wide range of speech and association ranging from legal representation and public advocacy to private association and human-rights training. And the consequences for violating the law are exceptionally grave, potentially subjecting individuals to lengthy prison terms for exercising their First Amendment rights. Accordingly, there is little doubt that the material support statute's overbreadth is substantial standing alone.

2. *The range of legitimate applications of the challenged provisions is comparatively narrow.*

In order to support an overbreadth challenge, "a statute's overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838 (citing *Bd. of Tr. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989)) (emphasis omitted); see also *Broadrick*, 413 U.S. at 615). Here, there are comparatively few legitimate applications of the offend-ing portions of the material support bar that would not independently be criminalized by the law's surviving, legitimate, provisions. Thus, the statute's impermissible overbreadth is all the more certain.

A law's permissible applications are those that reflect "legitimate state interests in [regulating] harmful, constitutionally *un*protected conduct." *Hicks*, 539 U.S. at 119 (quoting *Broadrick*, 413 U.S. at 615) (emphasis added). Precisely because the challenged provisions here overtly burden pure speech and pure association in a content-sensitive manner, there are precious few legitimate applications that might save them from constitutional invalidation.

At the outset, we note that the overbreadth balancing test should take into account the legitimate sweep only of the challenged terms, and not the entire material support bar. In rejecting HLP's overbreadth challenge below, the Ninth Circuit mistakenly believed that finding the challenged terms overbroad would require invalidating the material support law *in toto*. Thus the court weighed the overbreadth of the challenged provisions against the "legitimate applications" of *other* provisions not at issue here. In particular, the panel worried that holding the terms "service," "training," "expert advice or assistance" and "personnel" to be overbroad would prevent the government from "legitimate[ly]" enforcing the material support bar to prevent individuals from "providing foreign terrorist organizations with income, weapons, or expertise in constructing explosive devices." Pet. App. 28a.

The overbreadth doctrine does not require such a dramatic result, however, and calls for facial invalidation only of those particular provisions that are themselves overbroad—that is, it calls for severance of those provisions from the remainder of the statute. To be sure, if this Court finds the challenged provisions to be overbroad, it will be declaring them "facially" unconstitutional. But *facial* invalidation is an alternative to *as-applied* (not *partial*) invalidation: Whereas an as-applied challenge asserts that a statute or regulation "by its own terms, infringe[s] constitutional freedoms in the circumstances of the particular case" (*United States* v. *Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972) (per curiam)), a facial overbreadth challenge alleges that "no set of circumstances exists under which the [a]ct would be valid" (*United States* v. *Salerno*, 481 U.S. 739, 745 (1987)) because "requiring that challenges to an overbroad statute * * * proceed on [an as-applied] basis will chill" free exercise (Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 271 (1994)). Thus to strike down a provision as impermissibly overbroad on its face means only that it is unconstitutional as applied to *anyone*, not that the law within which the provision is located is invalid *in toto*. In this way, facial invalidation is fully compatible with partial invalidation, or severance.

Severance is surely the proper remedy here. As this Court has said before, "[a] statute is not to be declared unconstitutional in its entirety unless 'the invalid provisions are unseverable and * * * the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.'" *Brockett* v. *Spokane Arcades*, 472 U.S. 491, 506 (1985). Here, the challenged provisions can, and thus should, be "excised from the statute without altering the statute's intended purpose." *United States* v. *Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) (citing *United States* v. *Jackson*, 390 U.S.

570, 585–90 (1968)). Thus in considering whether to sever the terms "service," "training," "expert advice or assistance" and "personnel" from the material support bar, the Court should weigh their substantial overbreadth against the "legitimate" applications, not of the *entire* material support statute, but only of those specific provisions.

What is more, because the overbreadth balancing test requires consideration of the costs "in permitting some unprotected speech *to go unpunished*" (*Broadrick*, 413 U.S. at 612 (emphasis added)), the Court should consider only those legitimate applications not covered by other, non-challenged terms of the material support bar. From within this framework, severance would pose a very low "social cost[]" indeed (*Williams*, 128 S. Ct. at 1838): it appears that most (if not all) legitimate applications of the challenged provisions would be subsumed by the law's remaining terms. For example, "service," "training," and "expert advice" could consist of *money-laundering* services, *weapons* training, or *bomb-making* expertise—activities legitimately subject to regulation. But such activities are already captured by other provisions of the material support bar, including those forbidding the provision of "financial services," support ("tangible or intangible") concerning "weapons, lethal substances, [and] explosives" (§ 2339A(b)(1)), "funds" (§ 2339C(a)), and any "service" used in "preparation for" or to "carry[] out" specific terrorism-related crimes (§ 2339A(a)).

Thus invalidation of the "service," "training," and "expert advice" provisions would *not* let such activities go unpunished.[5] There is also little doubt that any of the narrow range of circumstances in which pure speech or pure association may legitimately be criminalized—such as speech amounting to incitement to crime (see *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1967)) or association with specific intent to further a group's illegal ends (*Scales* v. *United States*, 367 U.S. 203, 222 (1961))—would similarly be covered by the surviving portions of the statute. See 18 U.S.C. §§ 2339A, 2339B, 2339C. Accordingly, there is every reason to think that the "legitimate" applications of these provisions not separately criminalized by other provisions of the law are "dwarf[ed]" by "impermissible" applications. *Ferber*, 458 U.S. at 773.

Judged against the legitimate applications of the challenged provisions alone, there is little doubt that the statute's criminalization of "service," "training," "expert advice or assistance" and "personnel" *is* substantially overbroad. On the one hand, these provisions impose overt burdens upon pure speech and pure association based in part on content, and the penalties for violating them are grave. On the other hand, the range of legitimate applications of these provisions of the statute that would not otherwise be covered by other provisions of the material support bar are exceedingly narrow, if not non-existent. Accordingly, the challenged provisions are substantially overbroad as written.

---

[5] To the extent that other terms that are not themselves constitutionally suspect are sufficient to capture such conduct, the challenged provisions are almost certainly not "narrowly tailored" to that conduct. See, *e.g.*, *Boy Scouts* v. *Dale*, 530 U.S. 640, 659 (2000) (content-sensitive regulations of pure expression must be narrowly tailored to achieve a compelling governmental interest).

B. The material support law is overbroad in actual fact.

In order to justify facial invalidation, the material support bar's overbreadth must be clear "'from the text of [the law] *and* from actual fact'" (*Hicks*, 539 U.S. at 121 (quoting *New York State Club Ass'n*, 487 U.S. at 14) (emphasis added). The challenged terms plainly *are* overbroad in "actual fact."

Several specific examples demonstrate the material support bar's alarming encroachment on constitutionally protected speech. In one case, federal prosecutors invoked the material support bar's "expert advice and assistance" provision to prosecute Sami Omar Hussayen, a computer science doctoral student at the University of Idaho, for running a web site that included links to jihadist rhetoric by individuals associated with designated groups. See Susan Schmidt, *Saudi Acquitted of Internet Terror*, WASH. POST, June 11, 2004, at A3. The indictment against Hussayen alleged (among other things) that he had provided and conspired to provide material support to terrorist organizations in Chechnya and Israel on the basis that his website aided the groups "in general." *Ibid.* The prosecutor in the case was quoted as saying that mere "use of the Internet" alone can be sufficient to trigger a material support violation. *Ibid.* The jury ultimately acquitted Hussayen, apparently (according to one juror) because they concluded that his website activities were protected by the First Amendment. *Ibid.*

In another case, federal prosecutors charged Javed Iqbal with material support under § 2339A(b) for providing television broadcasting services to a foreign television station designated as a terrorist organization. See Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, Dec. 23, 2008. The district court rejected Iqbal's argument that his company's broadcasting of the Al Manar television station was protected by the First Amendment. *Ibid.* Iqbal, a respected Staten Island businessman, subsequently pleaded guilty to the charges for fear of receiving a greater sentence at trial. *Ibid.*

Similarly, in *United States* v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003), the government charged Lynne Stewart with, among other things, providing "personnel" (herself) to a designated terrorist organization, Islamic Gama'at. *Id.* at 353. The organization's leader, Sheikh Abdel Rahman, had earlier been charged with and convicted of committing certain crimes; Stewart represented him during his criminal trial and subsequently after his conviction. *Ibid.* In part on the basis of her continued representation of Rahman after his conviction, the government sought to prosecute her for providing Islamic Gama'at with "personnel." *Id.* at 359. In dismissing the certain portions of the original indictment on unconstitutional vagueness grounds, the district court observed that the government's theory of the material support bar's prohibition of providing "personnel" would "subject to criminal prosecution" any lawyer "acting as an agent of her client," where the client is either a designated organization or "an alleged leader" of a designated organization. *Id.* at 359.

On appeal, the Second Circuit agreed that "[t]he initial ['personnel'] charges raised the possibility * * * that under the government's reading of the statute," attorneys could be criminally liable for representing designated organizations. *United States* v. *Sattar*, No. 06-5015, 2009 WL 3818860, at *19 (2d Cir. Nov. 17, 2009). The court observed that the government's overbroad application of the material support bar had "created a situation in which the defendants could be punished for, in effect, providing themselves to speak out in support of the program or principles of a foreign terrorist organization, an activity protected by the First Amendment." *Ibid.*[6]

Finally, the facts of this very case are themselves telling. The HLP, a well-respected human rights organization with consultative status to the United Nations, had long been providing, through protected speech activities, human rights advocacy and peacemaking support to the Kurdistan Worker's Party (PKK). (HLP Br. at 10). In the mid-1990s, the Secretary of State designated the PKK—the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations—as a terrorist organization. *Id.* at 10–11. It is undisputed that the HLP intends to support only the lawful and nonviolent activities of the PKK, and that they will do so through pure speech and association. Nevertheless, they have spent the last decade in a legal battle with the United States government concerning their right to do what the Constitution guarantees them the freedom to do. *Id.* at 12. There is thus no doubt that "the threat of enforcement of [the material support bar is] deter[ing] people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Williams*, 128 S. Ct. at 1838.

---

[6] Steward ultimately was convicted pursuant to a superseding indictment under the material support statute for disseminating her client's messages abroad. The Second Circuit upheld that conviction. See *Sattar*, 2009 WL 3818860, at *52.

In the face of these prosecutions—which have, according to both judges and juries, encroached upon the First Amendment—there can be no serious doubt that the material support bar is preventing "those who desire to engage in legally protected expression * * * from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett*, 472 U.S. at 503. At the very least, these prosecutions show that the material support bar has directly burdened the constitutional rights of the specific defendants. Hussayen's and Stewart's prosecutions are particularly troubling because they demonstrate that the government is, indeed, using the material support bar to prosecute pure speech. Given the broad publicity surrounding both prosecutions, moreover, there can be little doubt that others have refrained from exercising their protected First Amendment rights, and the material support bar is generating precisely the sort of chilling effect the overbreadth doctrine is meant to correct.

This conclusion is reinforced by the frequency with which the government is utilizing the material support bar: Individuals' self-censorship for fear of prosecution will necessarily be more pervasive when the government is diligently enforcing the law giving rise to the chilling effect. The Center on Law and Security reports, for example, that in the seven years between September 11, 2001 and September 11, 2008, the federal government brought 492 prosecutions for violations of the material support provisions, with conviction rates well above 50%. See The Center on Law and Security, N.Y.U. Sch. of Law, *Terrorist Trial Report Card: September 11, 2008* (2008).[7] Moreover, the average sentence for convictions under both statutes was greater than eleven years in prison. *Ibid.* These prosecutions were brought most often against American citizens with no known or alleged affiliation with any designated terrorist organization. *Ibid.*

To be sure, the vast majority of these prosecutions have not been directed at pure speech or association. Although these prosecutions under the material support bar would thus be available regardless whether this Court invalidates the challenged terms as overbroad, there is little doubt that the great frequency with which the government has employed the material support bar *generally*, in combination with even a small sample of well-publicized unconstitutional prosecutions, is chilling protected expression as a matter of fact.[8]

---

[7] Available online at http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf.

[8] The Court need not be concerned that invalidating the challenged terms of the material support bar as unconstitutional (on either overbreadth or vagueness grounds) would interfere with Congress's ability to legislate in this arena. As the Constitution Project explained in its report, *Reforming the Material Support Laws*, Congress can and should remedy the vagueness problems raised in this litigation by, for example, expanding the category of support or resources exempt from the definition of material support to include such humanitarian aid items as medical services, civilian public health services, and, if provided to noncombatants, food, water, clothing, and shelter. Similarly, Congress could have avoided the overbreadth issues discussed in the text by simply omitting the challenged provisions of the statute, whose application to any given conduct is either duplicative of other provisions of the statute or constitutionally suspect.

* * * * *

It is clear "'from the text of [the law] and from actual fact'" (*Hicks*, 539 U.S. at 122 (quoting *New York State Club Ass'n*, 487 U.S. at 14), that the material support bar's "service," "training," "expert advice," and "personnel" provisions are substantially overbroad. As a matter of law, they are content-based restrictions upon pure speech and pure association, and they apply directly to a wide range of speech and association, potentially subjecting individuals to life in prison for exercising their First Amendment rights. As a matter of fact, the law is being used to prosecute protected speech, and there is little doubt that citizens across the Nation are refraining from undertaking protected speech and association, such as legal representation of a designated group in a challenge to their designation, for fear of similar prosecution. Accordingly, this Court should hold these provisions of the statute to be facially invalid and sever them from the material support bar.

CONCLUSION

The Court should hold that the Antiterrorism and Effective Death Penalty Act's prohibition of providing "service," "training," "expert advice," and "personnel" to designated terrorist organizations (18 U.S.C. §§ 2339A, 2339B) is unconstitutionally overbroad and sever these provisions from the statute.

Respectfully submitted.

SHARON BRADFORD FRANKLIN
The Constitution Project
1200 18th Street NW
Washington D.C. 20036
(202) 580-6920

JOHN W. WHITEHEAD
Rutherford Institute
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

DAVID M. GOSSETT
Counsel of Record
MICHAEL B. KIMBERLY*
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

**Admitted in Maryland only; practicing under supervision pursuant to D.C. App. Rule 49(c)(8).*

Counsel for the Amici Curiae

NOVEMBER 2009

APPENDIX

APPENDIX:

Members of the Constitution Project's Liberty and Security Committee Endorsing the Report: *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to Terrorist Organizations*[†]

- **Stephen Abraham**, Lieutenant Colonel (Ret.) Military Intelligence, United States Army Reserve; Partner, Fink & Abraham LLP
- **Azizah al-Hibri**, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights
- **Bob Barr**, Member of Congress (R-GA), 1995-2003; United States Attorney for the Northern District of Georgia, 1986-1990; the 21st Century Liberties Chair for Freedom and Privacy, the American Conservative Union; Chairman, Patriots to Restore Checks and Balances; Practicing Attorney
- **David E. Birenbaum**, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; U.S. Ambassador to the UN for UN Management and Reform, 1994-96
- **Christopher Bryant**, Professor of Law, University of Cincinnati; Assistant to the Senate Legal Counsel, 1997-99

[†] Affiliations listed for identification purposes only.

- **John E. Cloonan**, President, Clayton Consultants, Inc.; Special Agent, Federal Bureau of Investigation, New York Field Office, 1976-2002
- **David Cole**, Professor of Law, Georgetown University Law Center; Co-Chair, Liberty and Security Committee
- **John W. Dean**, Counsel to President Richard Nixon
- **Mickey Edwards**, Member of Congress (R-OK), 1977-1993, Chairman of the House Republican Policy Committee, 1989-1993; Former National Chairman, American Conservative Union; Founder, Heritage Foundation; Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University
- **Richard Epstein**, James Parker Hall Distinguished Service Professor of Law, the University of Chicago; Peter and Kirsten Bedford Senior Fellow, the Hoover Institution
- **Thomas B. Evans, Jr.**, Member of Congress (R-DE), 1977-1983; Co-Chairman, Republican National Committee, 1971-1973; Chairman, The Evans Group, Ltd.; Founder, Florida Coalition for Preservation
- **Eugene R. Fidell**, Florence Rogatz Lecturer in Law, Yale Law School
- **Michael German**, Policy Counsel, American Civil Liberties Union; Adjunct Professor, National Defense University School for National Security Executive Education; Special Agent, Federal Bureau of Investigation, 1988-2004

- **Dr. Morton H. Halperin**, Senior Advisor, Open Society Policy Center; Senior Fellow, Center for American Progress; Director of Policy Planning Staff, Department of State, Clinton administration
- **Asa Hutchinson,** Undersecretary, Department of Homeland Security, 2003-2005; Administrator, Drug Enforcement Administration, 2001-2003; Member of Congress (R-AR), 1997-2001; United States Attorney, Western District of Arkansas, 1982-1985; Senior Partner, Asa Hutchinson Law Group
- **David Keene**, Chairman, American Conservative Union; Co-Chair, Liberty and Security Committee
- **David Lawrence, Jr.**, President, Early Childhood Initiative Foundation; former Publisher, Miami Herald and Detroit Free Press
- **Neal Sonnett**, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; former Assistant United States Attorney and Chief of Criminal Division for the Southern District of Florida; former President, National Association of Criminal Defense Lawyers
- **Geoffrey R. Stone**, Harry Kalven, Jr., Distinguished Service Professor of Law, University of Chicago

- **Colby C. Vokey**, Lieutenant Colonel (Ret.) U.S. Marine Corps, 1987-2008; Lead Counsel for Guantanamo detainee Omar Khadr at Military Commissions, 2005-2007; Attorney, Fitzpatrick Hagood Smith & Uhl, LLP
- **Patricia McGowan Wald**, Judge, United States Court of Appeals for the D.C. Circuit, 1979-1999, Chief Judge, 1986-1991; former Judge, International Criminal Tribunal for the former Yugoslavia
- **John W. Whitehead**, President, The Rutherford Institute
- **Lawrence Wilkerson**, Colonel (Ret.) U.S. Army; Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; Chief of Staff to Secretary of State Colin Powell, 2002-2005
- **Roger Wilkins**, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of United States Community Relations Service, Johnson administration

AMICUS
CURIAE
BRIEF

⑬ ⑪

[illegible] U.S.
FILED
[illegible] 23 [illegible]

Nos. 08-1498, 09-89

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Petitioners,
v.
HUMANITARIAN LAW PROJECT, *et al.*,
Respondents.

HUMANITARIAN LAW PROJECT, *et al.*,
Cross-Petitioners,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SCHOLARS, ATTORNEYS, AND FORMER PUBLIC OFFICIALS WITH EXPERIENCE IN TERRORISM-RELATED ISSUES IN SUPPORT OF PETITIONERS

PROF. PETER MARGULIES
ROGER WILLIAMS
UNIVERSITY SCHOOL OF
LAW
10 Metacom Avenue
Bristol, RI 02809
(401)254-4564

BRADFORD A. BERENSON*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

December 23, 2009

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

BOTH 5ANRY10

17892 49

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

- I. SOUND POLICY SUPPORTS CONGRESS'S VIEW OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES 7
  - A. Services Are Fungible And Possess A Cash Value That Confers A Benefit On DFTOs 9
  - B. Compounding The Fungibility Problem, Terrorist Funding Is Often Off The Books 11
  - C. Material Support Of DFTOs' Social Service Programs Serves As An Incentive For Terror 12
  - D. Nonviolent Programs Aid Terrorist Recruitment And Retention 13
  - E. Putative Social Service Programs Also Assist DFTOs In Laundering Revenue Obtained Through Illicit Activities 13
  - F. Summary 16

TABLE OF CONTENTS – continued

Page

II. BECAUSE OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES, CONGRESS CAN LEGISLATE BROADLY TO CURB THE DIRECT AND INDIRECT PROVISION OF RESOURCES TO A DFTO 17

A. Congress Used The Prohibitions On "Training" And "Expert Advice Or Assistance" To Bar Concrete Collaboration That Results In Direct Benefits To The DFTO.. 18

B. Congress Can Also Bar Services That Indirectly Bolster Terrorist Financing..... 22

III. SECTION 2339B CLEARLY PERMITS INDEPENDENT ADVOCACY AND OTHER PROTECTED SPEECH.................. 24

A. The Statute Permits Independent Advocacy 24

B. The Statute Permits Independent Factfinding 25

C. The Statute Permits Legal Advice And Representation Subject To A Content-Neutral Licensing Process........................ 26

IV. BECAUSE § 2339B PROHIBITS ONLY CONCRETE COLLABORATION WITH A DFTO, IT IS NOT UNCONSTITUTIONALLY VAGUE.................................... 28

CONCLUSION 35

APPENDIX: List of *Amici* 1a

TABLE OF AUTHORITIES

CASES

Page

Al Haramain Islamic Found., Inc. v. United States, 2009 U.S. Dist. LEXIS 103373 (D. Orc. Nov. 5, 2009) 29

Birbrower, Montalbano, Condon & Frank P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998) 27

Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) 9, 13, 23

Crowell v. Benson, 285 U.S. 22 (1932) 25

Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4 (D.C. Cir. 2008) 6, 11, 23, 28

Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 28, 30

Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) 16

Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) ... 15, 20

Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009) .... *passim*

Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. Cal. 2000) 9, 11, 12, 17

Humanitarian Law Project v. U.S. Dep't of Treasury, 463 F. Supp. 2d 1049 (C.D. Ca. 2006), *aff'd*, 578 F.3d 1133 (9th Cir. 2009) 29

Humanitarian Law Project v. U.S. Treasury Dep't, 578 F.3d 1133 (9th Cir. 2009) .... *passim*

TABLE OF AUTHORITIES – continued

Page

Khan v. Holder, 584 F.3d 773 (9th Cir. 2009) 10

Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (D.C. Cir. 2004) 9, 11

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 18

Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) 27

Linde v. Arab Bank PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005) 12

NAACP v. Button, 371 U.S. 415 (1963) 27

In re New Hampshire Disabilities Rights Ctr., Inc., 541 A.2d 208 (N.H. 1988) 27

The Paquete Habana, 175 U.S. 677 (1900)... 26

Regan v. Wald, 468 U.S. 222 (1984) 4, 8, 22

Rubin v. Garvin, 544 F.3d 461 (2d Cir. 2008) 33

United States v. Afshari, 2009 U.S. Dist. LEXIS 31585 (C.D. Cal. Apr. 14, 2009)..... 10

United States v. Afshari, 426 F.3d 1150 (9th Cir. 2005) 9

United States v. Aref, 285 F. App'x 784 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1582 (2009) (Nos. 08-7650, 08-7651) 3

United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000) 1

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005) 11, 14

United States v. Hashmi, 2009 U.S. Dist. LEXIS 108321 (S.D.N.Y. Nov. 18, 2009)... 10

United States v. Kassir, 2009 U.S. Dist. LEXIS 83075 (S.D.N.Y. Sept. 11, 2009).... 18

Page
United States v. O'Brien, 391 U.S. 367 (1968) 28
United States v. Taleb-Jedi, 566 F. Supp. 2d 157 (E.D.N.Y. 2008) 10
Yates v. United States, 354 U.S. 298 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1987) 31
Zemel v. Rusk, 381 U.S. 1 (1965) 22

STATUTES AND REGULATIONS

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 .... 3, 7
8 U.S.C. § 1182(a)(3)(B)(i)(V) 23
18 U.S.C. § 2333(a) 1
18 U.S.C. § 2339A(b) .... *passim*
18 U.S.C. § 2339B .... *passim*
Cal. Bus. & Prof. Code § 6125 27
31 C.F.R. § 501.801(c) 20
31 C.F.R. § 597.505 .... 4, 6, 26

LEGISLATIVE HISTORY

Antiterrorism Act of 1990, Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. 79 (1990) 15
S. Rep. No. 102-342 (1992) 3, 9

SCHOLARLY AUTHORITIES

Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. 1 (2005) 8

Page

Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War against Illegal Armed Groups*, 15 Transnat'l L. & Contemp. Probs. 5 (2005) 11

Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313 (2000) 17

Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf 2, 8

OTHER AUTHORITIES

Am. Bar Ass'n, *Model Rules of Professional Conduct* (2009) 27

Eli Berman & David D. Laitin, Nat'l Bureau of Econ. Research, *Working Paper 13725, Religion, Terrorism, and Public Goods: Testing the Club Model* (2008) 13

Michael Birnbaum, *U.S. targets landlord of Md. Islamic center; Authorities suspect property's owner has ties to Iran government*, Wash. Post, Nov. 14, 2009 16

Erica Chenoweth et al., *Correspondence: What Makes Terrorists Tick*, 33 Int'l Sec. 180 (2009) 20

Council On Foreign Relations, *Terrorist Financing* (2002) 15

TABLE OF AUTHORITIES – continued

Page

Audrey Kurth Cronin et al., *Foreign Terrorist Organizations* (Cong. Research Serv. Feb. 6, 2004) 14

Fin. Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing* (2004), http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf 9

Bruce Hoffman, *Inside Terrorism* (1998) 14

Human Rights Watch, *Sri Lanka Under Siege* (Jan. 19, 2009), http://www.hrw.org/en/news/2009/01/29/sri-lanka-under-siege 34

Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Services of Jihad* (2006) 11, 13, 14, 15

Timothy W. Luke, *Postmodern Geopolitics: The Case of the 9.11 Attacks*, *in A Companion to Political Geography* 219 (John Agnew, Kathryne Mitchell & Gerald Toal eds., 2003) 21

Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provisions, and Terrorism*, 20 Terrorism & Pol. Violence 356 (2008) 12, 13

Lorna McGregor, *Beyond the Time and Space of Peace Talks: Re-Appropriating the Peace Process in Sri Lanka*, 11 Int'l J. Peace Stud. 39 (2006) 19

Peter Popham, *Tamil Tigers Break UN Pledge on Child Soldiers*, The Independent (London), Feb. 4, 2000 20

Page

Jerrold M. Post, Ehud Sprinznak & Laurita M. Denny, *Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15 Terrorism & Pol. Violence 171 (2003) . 12, 13

Ahmed Rashid, *Taliban* (2001) 14

Sumathi Reddy, *Sri Lanka conflict finds its way into aid efforts; Groups filled with distrust compete for donations*, Balt. Sun, Jan. 18, 2005 19

John Roth, Douglas Greenberg & Serena Wille, Nat'l Comm'n on Terrorist Attacks on the U.S., *Monograph on Terrorist Financing* (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf . 15

Marc Sageman, *Understanding Terror Networks* (2004) 14

Thomas J. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 SAIS Rev. 49 (2004) 14

Phil Williams, *Terrorist financing and organized crime: nexus, appropriation, or transformation?*, *in Countering the Financing of Terrorism* 126 (Thomas J. Biersteker & Sue E. Eckert eds., 2008).... 13, 14

INTERNATIONAL AUTHORITIES

Comm'n of Human Rights, United Nations, *Statement of the International Educational Development*, *available at* http://hlp.home.igc.org/docs/Sri_Lanka_Statement.htm (last visited Dec. 22, 2009) 33

Page
Security Council Resolution 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).............. 9

INTEREST OF *AMICI*

Amici "Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues" submit this brief in support of petitioners Eric Holder, et al.[1] *Amici* have wide-ranging experience in the matters at issue in this case. Participants include scholars who have written prominent articles and books on national security matters in general and terrorism-related criminal law in particular. These scholars also have hands-on experience in the field. One participant, Prof. Peter Raven-Hansen, is co-author of the leading casebook on national security law, and also serves as co-counsel for victims of terrorism seeking damages against alleged financiers of terrorism under the Anti-Terrorism Act, 18 U.S.C. § 2333(a). Another, Prof. Robert Chesney of the University of Texas, has served as an advisor to the current administration's Detention Policy Task Force, and has written extensively about the origins and post-9/11 applications of the statute at issue here.

Amici also include former government officials from an array of government agencies, including the Departments of State, Defense, and Justice. A number of *amici* have prosecuted terrorism cases in federal court. See, *e.g.*, *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000) (per curiam) (noting Paul W. Butler's appearance as Assistant United States Attorney in embassy bombings case). Former Federal

---

[1] Pursuant to Rule 37.6, *amici curiae* (identified and described individually in Appendix), certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Bureau of Investigation lawyer Marion "Spike" Bowman was integrally involved in national security and terrorism-related investigations for over twenty years. James Benjamin, Jr., a former federal prosecutor, has co-authored a widely cited analysis of terrorism prosecutions in federal court. See Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

The diverse backgrounds and perspectives of *amici* have yielded two core commitments. First, the United States must combat terrorism within a framework shaped by the rule of law, including respect for both procedural safeguards and the independent advocacy that the First Amendment protects. Second, Congress, as long as it crafts legislation consistent with the rule of law, has authority under the Constitution to curb direct and indirect assistance to entities designated by the Secretary of State as foreign terrorist organizations (DFTOs). Congress's capability in this realm complements its more familiar power to restrict trade with state sponsors of terrorism or other hostile nations. See *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1148 (9th Cir. 2009) (hereinafter *HLP v. Treasury*) (upholding framework under International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (IEEPA)). *Amici* believe that the federal material support statute, 18 U.S.C. § 2339B, both protects constitutional rights and prevents DFTOs from gaming the system to obtain resources for violence.

SUMMARY OF ARGUMENT

In enacting 18 U.S.C. § 2339B, Congress made a policy choice to treat DFTOs much as the IEEPA treats state sponsors of terrorism or other hostile foreign powers. State sponsors of terrorism such as Iran share at least two dangerous attributes with DFTOs such as Al Qaeda, Hamas, and the Liberation Tigers of Tamil Eelam (LTTE): first, they have a track record of planning and executing violence abroad, where the United States cannot directly regulate their activities. Second, both DFTOs and state sponsors of terrorism exploit a portfolio of sources of direct and indirect assistance, including contributions of cash, goods, or services, to enhance their capacity for violence. See *HLP v. Treasury*, 578 F.3d at 1148. These activities complement illicit conduct such as money laundering designed to conceal the proceeds of crime. See *United States v. Aref*, 285 F. App'x 784 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1582 (2009) (Nos. 08-7650, 08-7651) (upholding conviction of defendant for money laundering scheme intended to furnish material support to terrorist activity).

As a result of these shared attributes, Congress found that DFTOs, like state sponsors of terrorism, "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247. By barring "material support" of DFTOs, § 2339B complements statutes such as the Anti-Terrorism Act and the IEEPA in disrupting DFTO operations "at [each] point along the causal chain of terrorism." See S. Rep. No. 102-342 (1992). Accepting the arguments of cross-petitioners Humanitarian Law Project, et al.

(hereinafter "petitioners") would undermine Congress's comprehensive framework for addressing the challenges posed by both DFTOs and state sponsors of terrorism.

The Constitution does not require this result. In ruling that § 2339B was vague as applied to petitioners, see *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929 (9th Cir. 2009) (hereinafter *HLP v. Mukasey*), the court below failed to recognize that petitioners' position flows not from constitutional principle, but from a policy dispute with Congress. Petitioners make four critical mistakes. First, petitioners wrongly assert that § 2339B prohibits activities, such as independent advocacy, that the statute expressly permits. See 18 U.S.C. § 2339B(h). Second, they fail to acknowledge that the statute permits other activities, such as legal advice and representation, under a content-neutral license for which petitioners have failed to apply. See 31 C.F.R. § 597.505(a) (describing license); cf. *HLP v. Treasury*, 578 F.3d at 1151 (noting that petitioners have failed to apply for a license under the IEEPA). Third, petitioners fail to acknowledge that Congress can bar activities, such as assisting a DFTO with fundraising, that either directly or indirectly provide resources for violence. *Compare* Petitioners' Brief at 11 (arguing that First Amendment protects fundraising assistance), *with Regan v. Wald*, 468 U.S. 222, 242 (1984) (holding that under IEEPA Congress can prohibit both direct and indirect provision of resources to hostile foreign powers). Fourth, in claiming that the line between prohibited and permitted activities is vague, petitioners fail to acknowledge that Congress provided for exceptions such as those mentioned above whose contours are clear to a "person of ordinary intelligence." Cf. *HLP* *v. Treasury*, 578 F.3d at 1146-48 (rejecting vagueness challenge to IEEPA).

Congress's comprehensive definition of material support, including the provision of "personnel," "service," "training," and "expert advice or assistance," see 18 U.S.C. §§ 2339A(b)(1)-(3), 2339B(h), reduces to a common denominator: concrete collaboration with a DFTO that enhances its ability to acquire resources and instrumentalities for violence. Congress sought to deprive DFTOs of both direct and indirect benefits, just as it had deprived state sponsors of terrorism of such benefits under the IEEPA. See *HLP v. Treasury*, 578 F.3d at 1148. To deprive DFTOs of direct benefits, Congress can bar not only cash contributions, as petitioners concede, see Petitioners' Brief at 17, but also services with a cash value. For example, since Congress can bar financial assistance to a DFTO, it can also bar petitioners from assisting a DFTO in obtaining cash contributions from others. The court below erred by failing to recognize the broad scope of Congress' authority to prohibit help to these organizations. See *HLP v. Mukasey*, 552 F.3d at 929 (suggesting that the First Amendment protected assistance to a DFTO in raising cash or obtaining goods with a cash value).

Congress found that contributions of goods and services have a fungible cash value, increasing resources available for violence. See *HLP v. Treasury*, 578 F.3d at 1148 (providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts"). In addition, Congress sought in both § 2339B and the IEEPA to curb indirect benefits to DFTOs, such as revenue generated by the travel of service providers. Hostile foreign powers and DFTOs can capture this revenue through taxing residents of territory under their control. Under § 2339B, as under the IEEPA, Congress can regulate seemingly innocuous activities such as foreign travel that generate direct and indirect financial benefits for DFTOs. See *Emergency Coal. to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 12-13 (D.C. Cir. 2008) (hereinafter *Emergency Coal.*) (upholding Congress's authority under IEEPA to regulate tourism in order to limit indirect financial benefits provided to hostile foreign powers).

Congress also crafted § 2339B to preserve constitutional values. Congress expressly instructed that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. § 2339B(i). Consistent with that requirement, the text of § 2339B expressly permits independent advocacy. See § 2339B(h) (exempting persons "who act entirely independently of the foreign terrorist organization to advance its goals or objectives"). The same language protects independent factfinding by journalists, academics, and human rights groups. *Id.* It also protects expressive association with a DFTO, defined as nominal allegiance with the group for purely expressive purposes. In addition, the statute's content-neutral licensing provision allows legal advice and representation. Cf. 31 C.F.R. § 597.505(a) (implementing statute).

The statute's bar on collaboration that directly or indirectly enhances a particular DFTO's resources for violence sets a clear boundary between prohibited and protected activities. Ruling on a related statute, the Ninth Circuit recently rejected a vagueness challenge to the IEEPA's prohibitions on "services" to DFTOs and state sponsors of terrorism. See *HLP v. Treasury*, 578 F.3d at 1146-48. The *HLP v. Treasury* court recognized that a contrary holding would leave gaps in antiterrorism law enforcement and undermine Congress's power to exert leverage on hostile foreign powers. *Id.* The same danger would accompany a ruling for petitioners here. To avoid that risk, this Court should interpret § 2339B to bar collaboration with DFTOs beyond the exceptions already provided by Congress, and should uphold the constitutionality of the statute.

ARGUMENT

I. SOUND POLICY SUPPORTS CONGRESS'S VIEW OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES.

In enacting § 2399B, Congress recognized that DFTOs' violent and nonviolent activities have close functional ties. Petitioners claim that DFTOs can surgically separate violent and nonviolent tactics. See Petitioners' Brief at 17. However, the overwhelming weight of social science research and case law indicates that DFTOs structure their nonviolent activities to enhance their capacity for methodical campaigns of violence. Research amply supports Congress' view that DFTOs "are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7), 110 Stat. at 1247 (emphasis added).

In seeking to disrupt these synergies between violence and nonviolence, curbing financial contributions was Congress' most salient concern. However, Congress also recognized that a broad range of goods and services had cash value that provided direct or indirect benefits to DFTOs. Indeed, these intrinsically criminal enterprises could readily evade a narrow prohibition on direct financial support. Because of the close links between DFTOs' violent and nonviolent activities, assistance involving goods and services also raises the risk of terrorist violence.

Section 2339B is part of a comprehensive scheme that Congress fashioned over a period of years to address the complex problem of transnational terrorism. This comprehensive scheme also includes the IEEPA[2] and 18 U.S.C. § 2339A, which bars material support provided with knowledge or intent that the support would facilitate various predicate crimes. Because § 2339A required proof that the defendant knew or intended that his or her actions would facilitate illegal conduct, it did not fully address the provision of money, equipment, or other services to DFTOs by those who knew of the organizations' aims and methods but lacked knowledge of specific criminal plans. To fill this gap, Congress enacted the instant statute in 1996. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. 1, 12-18 (2005).

Section 2339B embodied Congress's understanding that prohibitions on the means of violence, such as "explosives," would be ineffective without limits on the financial and human capital that facilitated violence. In the 1996 Act and subsequent amendments, Congress prohibited provision of "any property, tangible or intangible, or service," including "financial services," "personnel," "training," and "expert advice or assistance." 18 U.S.C. § 2339B. See generally Zabel & Benjamin, *supra* (analyzing recent prosecutions under §§ 2339A & B). Barring both direct and indirect financial benefits dovetails with Congress's goal in comprehensive antiterrorism legislation to "interrupt, or at least imperil, the flow of money... at any point along the causal chain of terrorism." See S. Rep. No. 102-342, at 22 (1992) (setting out rationale for providing civil remedies for victims of terrorism in the Anti-Terrorism Act, 18 U.S.C. § 2332 *et seq.*).[3]

---

[2] Courts have consistently upheld the constitutionality of the IEEPA. *See Regan v. Wald*, 468 U.S. 222 (1984).

A. Services Are Fungible And Possess A Cash Value That Confers A Benefit On DFTOs.

Congress's rationale for barring direct and indirect assistance follows from the risks posed by fungible financial contributions to DFTOs. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. Cal. 2000) (hereinafter *HLP v. Reno*) (support for putatively nonviolent programs "frees up resources that can be used for terrorist acts").[4] While petitioners do not challenge the bar on providing cash to DFTOs, see Petitioners' Brief at 17, they ignore the fungibility of services with a cash value. Providing free services allows the DFTO to defray costs and shift resources to violence. See *HLP v. Treasury*, 578 F.3d at 1148 (providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts"). Recognizing the value of free services to a DFTO, one court recently observed that "[t]here is a fungibility to service for a terrorist organization just [as] there is fungibility to the funding of a terrorist organization." *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 168 (E.D.N.Y. 2008); see also *United States v. Afshari*, 2009 U.S. Dist. LEXIS 31585, at *18 (C.D. Cal. Apr. 14, 2009) (citing *Taleb-Jidi*); *United States v. Hashmi*, 2009 U.S. Dist. LEXIS108321, at *26-27 (S.D.N.Y. Nov. 18, 2009) (noting that distribution of goods to DFTO "would free up resources the group could then use in more violent expenditures").

---

[3] Money laundering by terrorist groups has become a focus of international, as well as domestic, concern. *See* Security Council Resolution 1373, U.N. Doc. S/RES/1373, § 1(d) (Sept. 28, 2001) (states are required to prohibit anyone within their personal or territorial jurisdiction from making any funds, resources or financial services available to persons who commit terrorist acts or to entities controlled by them); Fin. Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing* 1 (2004), http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf (noting importance of international cooperation).

[4] For further support on the fungibility issue, *see United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (because of fungibility, "donation of money could properly be viewed by the government as ... like the donation of bombs and ammunition"); *accord, Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc)

Services also have an indirect cash value to DFTOs. Groups like those of the petitioners here often seek to engage in activities in foreign territory controlled by DFTOs. For example, teaching members of the Sri Lankan LTTE about applying for "humanitarian aid" could entail traveling to LTTE-occupied territory.[5] Such travel typically includes the incidental expenditure of funds within the territory for food, lodging, and transportation. When groups spend money in DFTO-controlled territory, DFTOs "take their cut" through taxing or tithing residents. See

---

(hereinafter *Boim*), *cert. denied*, 130 S. Ct. 458 (2009); *Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009).

[5] Although, as petitioners note, Sri Lankan government forces recently defeated the LTTE, *see* Petitioners' Brief at 11 n.5, the group still has an international presence. *Id.*

Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Services of Jihad* 61-63 (2006) (discussing use of tithing to generate revenue for DFTO); Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 Transnat'l L. & Contemp. Probs. 5, 15 (2005) (discussing taxes imposed by the Revolutionary Armed Forces (FARC), a Colombian DFTO involved with narcotics trafficking); cf. *Emergency Coal.*, 545 F.3d at 12-13 (upholding travel restrictions under IEEPA to curb indirect benefits to hostile powers).

B. Compounding The Fungibility Problem, Terrorist Funding Is Often Off The Books.

Many terrorist groups' disdain for general accounting principles compounds the fungibility problem. In the absence of accounting safeguards, terrorist groups can use money slated for a nonviolent activity to support violence. See *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (commenting that "terrorist organizations can hardly be counted on to keep careful bookkeeping records"); *HLP v. Reno*, 205 F.3d at 1136 ("terrorist organizations do not maintain open books"); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) (citing *HLP v. Reno* discussion of terrorist accounting methods in holding that proof of specific intent is not required for criminal conviction based on defendant's financial contribution to Hizballah), *vacated on other grounds*, 543 U.S. 1097 (2005).

C. Material Support Of DFTOs' Social Service Programs Serves As An Incentive For Terror.

DFTOs also use putatively nonviolent programs to enhance incentives for terrorist activity. For example, a terrorist group may use contributions supposedly earmarked for "peaceful purposes" to aid the families of suicide bombers, "thus making the decision to engage in terrorism more attractive." See *HLP v. Reno*, 205 F.3d at 1136; *Boim*, 549 F.3d at 698 (DFTO's "social welfare activities reinforce its terrorist activities ... by providing economic assistance to the families of ... fighters"); *Linde v. Arab Bank PLC,* 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (targeted payments to families of suicide bombers constitute "incentive" to terrorist acts); cf. Jerrold M. Post, Ehud Sprinznak & Laurita M. Denny, *Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists,* 15 Terrorism & Pol. Violence 171, 177 (2003) (quoting jailed terrorist as noting that "families of terrorists who were wounded, killed, or captured enjoyed a great deal of economic aid and attention ... families got a great deal of material assistance, including the construction of new homes"). The provision of social services increases community assistance for *all* aspects of a group's operation, including violent attacks. See Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provisions, and Terrorism*, 20 Terrorism & Pol. Violence 356, 365 (2008). By pairing institutionalized social services and force, DFTOs seek to both subvert and supplant the state, obliging the United States and its allies to devote more resources to bolstering legitimate state authority.

D. Nonviolent Programs Aid Terrorist Recruitment And Retention.

Contributions to putatively nonviolent programs, such as schools and mosques run by terrorist groups, also underwrite indoctrination and recruitment into violence. See *Boim*, 549 F.3d at 698 (Hamas's "social welfare activities reinforce its terrorist activities ... [by] providing funds for indoctrinating school-children"); Levitt, *supra*, at 135 (noting links between Hamas-affiliated cleric preaching violence and individual inspired by cleric to "scout potential sites for suicide bombings in Jerusalem"); Post et al., *supra*, at 173 (50 percent of jailed terrorists interviewed by authors cited experience at a mosque or other religious influence as "central"). The provision of public goods such as education, health services, and welfare by terrorist groups also deters defection, since a defector and his family lose entitlement to the public goods. See generally *Boim*, 549 F.3d at 698 (noting that Hamas's social service programs "mak[e] it more costly ... to defect"); Eli Berman & David D. Laitin, Nat'l Bureau of Econ. Research, Working Paper 13725, ***Religion, Terrorism, and Public Goods: Testing the Club Model*** 3 & n. 5, 4, 24 (2008) (same); see also Magouirk, *supra*, at 358 (discussing Hamas' provision of social services).

E. Putative Social Service Programs Also Assist DFTOs In Laundering Revenue Obtained Through Illicit Activities.

DFTOs such as the LTTE rely on money from drug trafficking and other illicit activities. See Phil Williams, *Terrorist financing and organized crime: nexus, appropriation, or transformation?*, *in Countering the Financing of Terrorism* 126, 138-39 (Thomas J. Biersteker & Sue E. Eckert eds., 2008) (detailing the involvement of LTTE in criminal conduct, including heroin trade, human trafficking, gun-running, and extortion). DFTOs need to conceal the origins of the cash obtained through crime. Charitable activities are a convenient vessel for DFTOs' money laundering.

Scholars have noted the pervasive reliance of DFTOs on illicit activity. See Bruce Hoffman, *Inside Terrorism* 27-28 (1998) (noting "strategic alliances" between organized crime and terrorist groups); Ahmed Rashid, *Taliban* 117-18 (2001) (describing Taliban's reliance on revenue from opium trade); Marc Sageman, *Understanding Terror Networks* 82 (2004) (discussing religiously approved involvement of terrorist operatives in "petty crime" which helps fund terrorist groups). In Colombia, the FARC has become what researchers call a "commercial insurgency," Williams, *supra*, at 132, turning to drug trafficking to gain substantial revenue. *Id.*; see also Audrey Kurth Cronin et al., *Foreign Terrorist Organizations* 92 (Cong. Research Serv. Feb. 6, 2004) (discussing FARC's reliance on drug trafficking); Thomas J. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 SAIS Rev. 49, 51 (2004) (same). FARC also taxes other players in the drug trade in areas which it controls. See Williams, *supra*, at 132. Hamas has been involved in a spectrum of illegal activities, including drug trafficking and credit card fraud. See Levitt, *supra*, at 70-73; see also Sanderson, *supra*, at 54 (discussing Hamas and Hizballah involvement in drug trafficking in tri-border region of Argentina, Brazil, and Paraguay). In addition to the drug trade, Hizballah has sought to skim money from illegal cigarette sales in the United States. See *Hammoud*, 381 F.3d at 325-26.

DFTOs' involvement in putative philanthropy aids in laundering the proceeds of such illicit activities. See John Roth, Douglas Greenberg & Serena Wille, Nat'l Comm'n on Terrorist Attacks on the U.S., *Monograph on Terrorist Financing* 21-22 (2004) (9/11 Comm'n), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (analyzing role of charities in funding Al Qaeda); Council On Foreign Relations, *Terrorist Financing* 12 (2002) (noting that DFTOs collaborate on strategies for money laundering); *cf.* Levitt, *supra*, at 70-73 (noting Hamas' reliance on money laundering techniques). Charities perform a double purpose: DFTOs can disguise the proceeds of illicit activities as charitable contributions, and can then conceal funding for allies and operatives of the DFTO as payments for charitable services. *Cf.* Antiterrorism Act of 1990, Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. 79 (1990) (Statement of Joseph Morris) ("[a]nything that could be done to deter ... money-laundering in the United States ... would also help deter terrorism").

To enhance their prospects for money laundering and financial manipulation, both DFTOs and state sponsors of terrorism also seek to establish front groups within the United States. Nonprofit foundations in this category acquire revenue and assets for the benefit of the DFTO or state sponsor of terrorism. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (finding that Hamas had beneficial interest in assets and revenue of foundation; proof of such interest supported order blocking foundation's assets); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753-54 (7th Cir. 2002) (holding that terrorist group's beneficial interest in foundation assets would support order freezing assets); see also Michael Birnbaum, *U.S. targets landlord of Md. Islamic center; Authorities suspect property's owner has ties to Iran government*, Wash. Post, Nov. 14, 2009, at B1 (reporting on government's initiation of forfeiture proceedings regarding valuable assets allegedly held by nonprofit group as a front for Iran). Certain nonviolent activities such as providing instruction to members of a DFTO can furnish a convenient façade for the establishment of domestic organizations in which DFTOs hold beneficial interests. Cf. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 71-73 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (substantial evidence supported government's finding that foundation misrepresented aid to families of suicide bombers).

F. Summary.

Case law and social science research vindicate Congress's view that both cash and in-kind contributions for social services enhance DFTOs' ability to engage in violence. Curbing cash contributions removes a central building block in the architecture of terror. Regulating in-kind contributions of goods and services that DFTOs can cash out directly or indirectly reinforces the bar on cash transfers and bolsters Congress's comprehensive antiterrorism framework.

II. BECAUSE OF THE FUNCTIONAL RELATIONSHIP BETWEEN A DFTO'S VIOLENT AND PUTATIVELY NONVIOLENT ACTIVITIES, CONGRESS CAN LEGISLATE BROADLY TO CURB THE DIRECT AND INDIRECT PROVISION OF RESOURCES TO A DFTO.

Congress can legislate comprehensively to deprive foreign terrorist group of resources. As courts have repeatedly recognized, the difficulties of regulating terrorist violence abroad and the interaction of a DFTO's violent and nonviolent activities allow Congress to employ prophylactic measures which take broad aim at the problem. See *HLP v. Treasury*, 578 F.3d at 1146. Interpreting the IEEPA's related comprehensive scheme, the Ninth Circuit has recently held that with certain exceptions required by the Constitution, Congress can bar an individual or entity from "perform[ing] a useful professional or business task for a terrorist organization." See *id.* In seeking to disrupt transnational terrorism, Congress need not require a showing that each and every instance of service delivery directly facilitates violence. Rather, Congress, having provided for clear and limited exceptions, may bar categories of material support conferring both direct and indirect benefits on DFTOs. Indeed, the difficulties of obtaining and acting on information abroad would make more finely-grained classifications unworkable.[6] To fulfill its goal of shutting off the flow of money and resources to DFTOs, Congress has taken this broad approach under § 2339B.

---

[6] Courts have invoked an analogous rationale in upholding the statute's bar on direct cash contributions. *See HLP v. Reno*, 205 F.3d at 1136-38. *Cf.* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313, 331 (2000) (justifying prophylactic regulation on grounds that United States "has

A. Congress Used The Prohibitions On "Training" And "Expert Advice Or Assistance" To Bar Concrete Collaboration That Results In Direct Benefits To The DFTO.

The statutory definitions of "training" as the teaching of a "specific skill," 18 U.S.C. § 2339A(b)(2), and "expert advice or assistance" as "scientific, technical or other specialized knowledge," see *id.* at (b)(3), target collaboration with a DFTO that confers a direct benefit on the group's ability to marshal resources for violence. "Training" foreign terrorists in a "specific skill" they previously lacked involves concrete collaboration with a DFTO that enhances the DFTO's structure, operation, and resources. "Expert advice or assistance" is "specialized" since it entails advanced knowledge that is "foreign" to a layperson's experience, see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148-49 (1999) (defining expert testimony), and therefore provides a benefit to the DFTO that would otherwise be unavailable.

The link between concrete collaboration and the danger posed by DFTOs is most obvious in training regarding instrumentalities of violence. See *United States v. Kassir*, 2009 U.S. Dist. LEXIS 83075, at *22 (S.D.N.Y. Sept. 11, 2009) (upholding the defendant's conviction for providing training to individuals on how to modify an AK-47 to fire grenades). However,

---

limited ability to enforce anti-terrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries").

the provision of expert judgment in other realms also has a cash value that can aid terrorist groups. Just as a DFTO can use currency to buy explosives, it can use expert advice to fine-tune its funding mechanisms, cost structure, and capacity for violence. For example, a construction expert who teaches Hamas how to build an indoctrination center for youth more cheaply also allows the group to shift more resources from such services to violent activities. To counteract this risk, the statutory scheme allows only limited avenues for providing expert judgment, and requires that lawyers and others wishing to provide such help obtain a license from the Treasury Department. See Point III.C, *infra*.

Much of the conduct in which petitioners seek to engage would furnish direct assistance to a DFTO's financing or violent capabilities. Consider, for example, petitioners' desire to teach members of the LTTE how to obtain tsunami-related aid from international bodies. See Petitioners' Brief at 11. The court below viewed this as a harmless philanthropic act. See *HLP v. Mukasey*, 552 F.3d at 929. However, given the link that Congress identified between a DFTO's violent and nonviolent conduct, tsunami aid presents bountiful opportunities for siphoning off money intended for disaster response, punishing and extorting internal opponents through the allocation of such aid, and laundering proceeds of illicit activity. See, *e.g.*, Sumathi Reddy, *Sri Lanka conflict finds its way into aid efforts; Groups filled with distrust compete for donations*, Balt. Sun, Jan. 18, 2005, at 5A (noting concerns that LTTE, which has often targeted moderate Tamils for murder, will divert aid intended for tsunami victims); cf. Lorna McGregor, *Beyond the Time and Space of Peace Talks: Re-Appropriating the*

Peace Process in Sri Lanka, 11 Int'l J. Peace Stud. 39, 45 (2006) (noting that as of 2006, LTTE continued to "assassinate its political opponents, extort taxes, recruit children into its forces, [and] attack the Muslim community within the territory it controls"); Erica Chenoweth et al., *Correspondence: What Makes Terrorists Tick*, 33 Int'l Sec. 180, 185 (2009) (noting that LTTE has striven for dominance among Tamils through killing of members of rival Tamil factions); Peter Popham, *Tamil Tigers Break UN Pledge on Child Soldiers*, The Independent (London), Feb. 4, 2000, at 18 (reporting that LTTE only allowed families to receive humanitarian aid if "one or more family members perform a service," including service as a child soldier). Once the LTTE receives tsunami aid, there are few constraints on how it actually spends the cash. The Constitution does not make trust in a DFTO Congress's sole policy option.[7]

Just as "there is no constitutional right to fund terrorism," see *Holy Land Found. for Relief & Dev*, 333 F.3d at 165, there is no constitutional right to assist terrorists in securing funding. Indeed, the court below seemed to entertain second thoughts about according fundraising assistance First Amendment protection, cautioning that § 2339B might not be vague when applied to a service that "resulted in the receipt of money by the [DFTO] itself." *HLP v. Mukasey*, 552 F.3d at 930 n.8. The court below was wrong, however, in assuming that the Constitution requires individualized proof of the nexus between a particular service and the DFTO's financial advantage. Rather, under the Constitution, as the Ninth Circuit has recognized in a related case, Congress may legislate prophylactically, by barring performance of any "useful professional or business task for a terrorist organization." See *HLP v. Treasury*, 578 F.3d at 1146.

---

[7] Admittedly, Congress's policy choices under both the IEEPA and § 2339B entail trade-offs, as do virtually all decisions in the complex domain of foreign affairs. For example, Congress authorized federal agencies to permit private groups to provide aid to victims of humanitarian crises. See 31 C.F.R. § 501.801(c) (authorizing granting of licenses to nongovernmental organizations supplying aid "for the purpose of relieving human suffering"). In reviewing such groups' plans to ensure that a DFTO controlling the territory does not benefit, a government agency may move more deliberately than some would wish. Congress made the policy choice that such deliberation presents fewer risks than trusting in the diligence of DFTOs. While this policy choice may be incorrect, it is surely one that the Constitution reserves to Congress.

Congress can legislate broadly to prevent other concrete collaborations that confer a direct benefit on a foreign terrorist organization. For example, consider petitioners' wish to teach political geography to a DFTO. See Petitioners' Brief at 27. Petitioners think it unreasonable that Congress's bar on training in specific skills would prohibit an instructor from responding to DFTO members' questions regarding the particular activities of the group. See *id.* at 27-28. Yet this result is neither unreasonable nor surprising, given the contours of the topic. Political geographers have provided detailed analyses of the techniques used by terrorist groups to select the tools and targets of violence. See Timothy W. Luke, *Postmodern Geopolitics: The Case of the 9.11 Attacks, in, A Companion to Political Geography* 219, 221 (John Agnew, Kathryne Mitchell & Gerald Toal eds., 2003) (noting that "Lethal capabilities can be created simply by [reconfiguring] everyday uses ... [including] agricultural fertilizers [and] rental trucks"). As it must under the First Amendment, the statute permits a researcher to contact DFTOs for factfinding purposes and publish his or her analysis. See Point III, *infra*. However, a DFTO's sponsorship of a question and answer session with a researcher on terrorist capabilities would likely entail more than mere distribution of the researcher's findings. Interlocutors at a DFTO-sponsored question and answer session would likely also exploit the political geographer's expert judgment on how that particular group can most efficiently locate infrastructure such as safe-houses, tunnels, and bomb-making sites. Congress can bar the provision of such concrete instruction to foreign terrorist groups.

To curb a DFTO's capability to inflict violence, Congress can also prohibit expert advice or assistance derived from "scientific" or "technical" knowledge. See 18 U.S.C. § 2339A(b)(3). Under this prohibition, an individual could not share with a DFTO or its members written material about nuclear physics, even if the material did not include concrete guidance on how to build a nuclear weapon. Congress clearly believed that even the provision of general material on physics, chemistry, biology, and engineering would facilitate a DFTO's development of means of violence. Here, too, Congress has the power to legislate broadly to achieve its objective.

B. Congress Can Also Bar Services That Indirectly Bolster Terrorist Financing

To supplement the curb on direct assistance, Congress can bar the performance of tasks that confer an indirect benefit on a DFTO's financing capabilities. This Court has recognized that Congress may enact a comprehensive bar on travel to or trade with countries, such as state sponsors of terror, that pose a risk to the United States. See *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). In such cases, Congress has often focused not merely on direct assistance to foreign powers that pose a danger, but also on curbing the indirect financial advantages that foreign powers can reap from seemingly harmless activities such as tourism. See, *e.g.*, *Emergency Coal.*, 545 F.3d at 12-13 (describing tourism as "critical and much-exploited revenue source" for foreign government deemed hostile to American foreign policy interests). The Constitution grants Congress this power to provide leverage in negotiations with hostile nations. *Id.* If Congress can regulate tourism, it can surely regulate activities with similar indirect benefits that flow from concrete collaboration with DFTOs.

In order to bar both state sponsors of terror and DFTOs from reaping these indirect benefits, Congress has the constitutional authority to prohibit concrete collaboration with such entities. Petitioners maintain that teaching foreign nationals overseas is "pure speech," immune from regulation. See Petitioners' Brief at 11, 17. However, courts have repeatedly recognized Congress' power to curb indirect benefits to hostile regimes by regulating instruction overseas. See *Emergency Coal.*, 545 F.3d at 12-13.

Consider teaching English in a Hamas-controlled school. If the class involves adult Hamas operatives, English instruction can help such operatives conceal their identity and gain entrance to territory that they cannot lawfully enter, including the United States. Cf. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(i)(V (excluding members of DFTOs). Second, an English teacher who becomes part of the DFTO's larger social service apparatus helps bond residents to the organization's campaign of violence, making them dependent on the DFTO's largesse. See *Boim*, 549 F.3d at 698. Third, an entity that offers to *donate* English-teaching services saves the DFTO resources, which it is free to apply to the instrumentalities of violence. As the Ninth Circuit recently observed in upholding the related IEEPA scheme, providing services to DFTOs "saves them money, which in turn increases the means at their disposal for terrorist acts." See *HLP v. Treasury*, 578 F.3d at 1148. Fourth, a teacher from the United States spends dollars in the Hamas-controlled economy, which Hamas can tax, just as hostile regimes tax tourist dollars limited under the IEEPA. Finally, Hamas can also mask expenditures for violence by inflating ancillary spending required for the teacher's support. Congress can legislate to deprive DFTOs of each of these benefits.

III. SECTION 2339B CLEARLY PERMITS INDEPENDENT ADVOCACY AND OTHER PROTECTED SPEECH

Congress's comprehensive framework also permits a number of activities in which petitioners seek to engage. The statute's text and regulations allow independent advocacy and factfinding, expressive membership, and legal advice and representation. These safe harbors reflect Congress' intent that the statutory scheme not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. § 2339B(i). The clear exceptions for constitutional rights that Congress built into the statute's coverage also expose the hyperbole in petitioners' parade of horribles.

A. The Statute Permits Independent Advocacy.

The statute's terms clearly permit independent advocacy, regardless of content. For example, the statute poses no obstacle to petitioners' wish to argue for goals supported by the LTTE and other DFTOs.

Contrary to petitioners' contention, see Petitioners' Brief at 24-25, Congress expressly crafted § 2339B to protect such "pure speech." Subsection (h) exempts from coverage "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." Under the statute, such individuals do not act under the DFTO's "direction or control." 18 U.S.C. § 2339B(h). Indeed, the Ninth Circuit has relied on the government's recognition that the related IEEPA scheme does not bar independent advocacy. See *HLP v. Treasury*, 578 F.3d at 1147 (citing 72 Fed. Reg. 4206 (Jan. 30, 2007)) (criteria for designating individuals and entities as transnational terrorists will be applied in a content-neutral manner consistent with the First Amendment).

B. The Statute Permits Independent Fact-finding.

Just as the statute clearly exempts independent advocacy, it also exempts independent fact-finding. Individuals or entities such as academics, journalists, or human rights organizations contact members of a DFTO in the course of their important work. Given Congress' intent to accommodate First Amendment concerns and the well-known canon counseling avoidance of constitutional problems, see *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932), independent fact-finders would clearly not be acting under the "direction or control" of the DFTO within the meaning of the statute.[8] Moreover, by virtue of their independence, such groups serve the public generally; under the statute, therefore, they do not provide services "to" a DFTO. For similar reasons, the statute's coverage does not extend to the activities of impartial and independent global mediators such as the Carter Center.

---

[8] On similar reasoning, the statute permits expressive membership, defined as an individual's purely nominal affiliation with an organization for the purpose of stating his or her agreement with the group's objectives. Since the First Amendment would protect such an expression of allegiance, and

C. The Statute Permits Legal Advice And Representation Subject To A Content-Neutral Licensing Process.

The statutory scheme would also permit petitioners to provide legal advice and representation under a content-neutral licensing procedure. For example, petitioners wish to provide training in general principles of international law to members of the LTTE and another DFTO, and offer assistance in peace negotiations. Petitioners' Brief at 10-11. Regulations allow an attorney to provide advice to a DFTO on compliance with applicable United States law. See 31 C.F.R. § 597.505(a). Since international law is "part of our law" for this purpose, see *The Paquete Habana*, 175 U.S. 677, 700 (1900), the regulations clearly would allow petitioners to obtain a license to perform such tasks. A license to provide legal services would extend to representation of a DFTO in United States legal proceedings, including the filing of *amicus* briefs. See 31 C.F.R. § 597.505(c), (d).[9]

Congress expressly stated its intent to legislate consistently with free speech guarantees, courts should read the statute's definition of "personnel," *see* 18 U.S.C. § 2339B(h), to exclude expressive membership.

[9] The government was incorrect in arguing below that submitting an *amicus* brief on a DFTO's behalf would be prohibited "expert advice or assistance" under the statute. *See HLP v. Mukasey*, 552 F.3d at 930. *Amici* believe that a content-neutral licensing scheme for legal advice and representation

The licensing framework requires that petitioners provide training on international law through an attorney. However, this requirement hardly renders the statutory framework constitutionally infirm. Limiting the provision of legal advice to lawyers is consistent with state regulation governing professional services. See *In re New Hampshire Disabilities Rights Ctr., Inc.*, 541 A.2d 208, 213-14 (N.H. 1988) (Souter, J.) (ruling that United States Constitution requires leeway for nonprofit organization providing legal services, while assuming that only lawyers would provide such services); see generally *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (interpreting California Business and Professions Code § 6125, which states that, "No person shall practice law in California unless the person is an active member of the State Bar."). Moreover, attorneys must comply with professional rules, such as refraining from counseling or assisting in unlawful activity, that provide an additional check on a DFTO's ability to mask material support as permissible assistance. See Am. Bar Ass'n, *Model Rules of Professional Conduct*, R. 1.2(d) (2009). Since the Constitution permits such regulation in the domestic realm, it would be anomalous to subject regulation of DFTOs to a more exacting standard.

Requiring a license for services that directly or indirectly benefit a foreign entity is constitutional, as

---

including the filing of *amicus* briefs – is included within the statutory framework and may well be constitutionally required. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-49 (2001) (striking down content-based restriction on assistance provided by government-funded attorneys); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (noting First Amendment interest in provision of legal assistance in civil rights matters).

long as the criteria for licensing are content-neutral, further an important governmental objective, and are tailored to achieve that goal. See *Emergency Coal.*, 545 F.3d at 12-13 (upholding IEEPA regulations regarding travel to Cuba as imposing merely incidental burden on free speech); see generally *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (outlining standard for incidental restrictions on speech). The framework adopted by Congress easily meets these criteria. However, petitioners have failed to take "Yes" for an answer, since they have apparently never sought a license under the statute. Cf. *HLP v. Treasury*, 578 F.3d at 1151 (noting that petitioners never sought a license under the IEEPA, and therefore lacked standing to challenge licensing process).

IV. BECAUSE § 2339B PROHIBITS ONLY CONCRETE COLLABORATION WITH A DFTO, IT IS NOT UNCONSTITUTIONALLY VAGUE

Because § 2339B permits the activities outlined above and forbids only concrete collaboration with a DFTO, the prohibition on providing material support to terrorist organizations is not unconstitutionally vague. Vagueness doctrine requires that the statute set a boundary between lawful and unlawful conduct that is discernible by a "person of ordinary intelligence." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Section 2339B meets this standard, as the actions of petitioners demonstrate.

Interpreted to both bar concrete collaboration and permit under license the exceptions described, the statute tracks the IEEPA scheme recently upheld by the Ninth Circuit. See *HLP v. Treasury*, 578 F.3d at 1146-48. As the Ninth Circuit suggested, the IEEPA scheme, which also includes a bar on providing services without a license, is broad. *Id.* However, as the Ninth Circuit emphasized in *HLP v. Treasury*, a statute that is broad can also be quite clear in practice.

Interpreting the terms "specific skill" and "specialized knowledge" in the statute's respective definitions of "training" and "expert advice or assistance" as entailing concrete collaboration retains both the statute's breadth and its clarity. This interpretation focuses on the nature and function of the relationship between the provider of material support and the DFTO. When the relationship is interactive and could result directly or indirectly in the DFTO's acquisition of resources, the statute prohibits it, unless it is performed under license. When a person acts independently of a DTFO and provides it with no resources, the statute simply does not come into play. This line is clear and readily apparent from the statute's text.

A similar test applies to the statutory term, "service." Using a comparable definition under the related IEEPA framework, a court viewed "service" as "by and large, a word of common understanding and one that could not be used for selective or subjective enforcement." See *Humanitarian Law Project v. U.S. Dep't of Treasury*, 463 F. Supp. 2d 1049, 1063 (C.D. Ca. 2006), *aff'd*, 578 F.3d 1133 (9th Cir. 2009); see also *Al Haramain Islamic Found., Inc. v. United States*, 2009 U.S. Dist. LEXIS 103373, at *50 (D. Ore. Nov. 5, 2009) (finding no vagueness in 31 C.F.R. § 594.406(b), which bars unlicensed provision of "'legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services'"). A person of ordinary intelligence and prudence would understand that § 2339B bars collaborative instruction but permits independent advocacy, conducting independent research on the group, or providing legal services authorized under license. The Constitution does not require greater precision. See *Grayned*, 408 U.S. at 110 (given the limits of language, vagueness doctrine does not require specification to a "mathematical certainty").

The statute's definition of "personnel" as including those serving under the "direction or control" of the DFTO is also clear, as the court below found. See *HLP v. Mukasey*, 552 F.3d at 931. As the court observed, Congress's use of the terms "direction or control" excludes independent advocacy from the statute's ambit. *Id.* These terms restrict coverage to the provision of individuals ready to obey the DFTO's orders, which might entail violence or other illegal conduct. The court below found that Congress's express exclusion of "entirely independent" activity made its intent clear. *Id.* Petitioners argue that Congress' exclusion of "'entirely independent'" activity requires individuals to guess whether *any* contacts with a DFTO are permissible. Petitioners' Brief at 36. However, this argument reads entirely too much into the word, "entirely." The word's placement in the statute, together with Congress's express intent to avoid First Amendment problems, demonstrates that Congress did not seek to regulate the *number* of an individual's contacts with the DFTO. Rather, as in the interpretation of the terms "specific" and "specialized" elsewhere in the statute, Congress sought to regulate the *nature and function* of the relationship with the terrorist group. On this view, the phrase "entirely independent" merely highlights the prohibition of a particularly dangerous concrete collaboration: linking current DFTO operatives with individuals ready to do the DFTO's bidding.[10] A person of ordinary intelligence can readily ascertain the difference between merely having contact with a DTFO and submitting to its direction or control, and can conform his or her conduct accordingly.

The statute is also clear in its classification of "scientific" or "technical" knowledge as "expert advice or assistance." See 18 U.S.C. § 2339A(b)(3). As the court below recognized in ruling against petitioners on this point, the words "scientific" and "technical" have a clear and accepted meaning "reasonably understandable to a person of ordinary intelligence." See *HLP v. Mukasey*, 552 F.3d at 930. A person of ordinary intelligence would understand that Congress sought to curb a DFTO's access to specialized knowledge that would aid the development or refinement of means of violence. To conform her conduct to legal requirements, such a person would avoid knowingly furnishing a DFTO specialized knowledge of fields such as physics, chemistry, biology, or engineering, even outside an interactive classroom setting. This requirement is broad, but hardly vague.

---

[10] Because the statute does not regulate either independent advocacy or the number of contacts with a DFTO, petitioners are incorrect that it punishes mere association. *See* Petitioners' Brief at 56-57. Rather, as the court below noted, the statute prohibits knowing conduct: the provision of material support with knowledge that the group was a DFTO, or is presently or has engaged in terrorist activities or terrorism. *See HLP v. Mukasey*, 552 F.3d at 926; *see also Yates v. United States*, 354 U.S. 298, 330 n.36 (1957) (noting that Constitution bars conviction based on mere association divorced from conduct), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978).

Petitioners' argument for vagueness, in contrast, rests on two shaky pillars: 1) the assertion that a bar on "specific" training necessarily entails parsing terms of degree, and, 2) opposition to the breadth of the statute. Petitioners seek to characterize the statutory language as embodying "'terms of degree,'" Petitioners' Brief at 27, which they argue are inherently vague. However, the statute addresses differences of kind, not degree, through a functional inquiry into the relationship between the provider of material support and the DFTO. Ultimately, as the Ninth Circuit recently observed, petitioners' fundamental complaint is with the statute's breadth. *HLP v. Treasury*, 578 F.3d at 1148. The *HLP v. Treasury* court held that the IEEPA's comprehensive framework, echoed by § 2399B, did not present vagueness problems. *Id.* at 1146-48. Indeed, as the Ninth Circuit observed, the guidance provided by the comprehensiveness of the statute decisively countered vagueness concerns: a person of ordinary intelligence knows that, with very limited exceptions, it is illegal to engage in any kind of concrete collaboration with, or provide concrete help or support to, a terrorist group. That, too, is a broad injunction, but it is not vague.

Acknowledging Congress' power to enact broad prohibitions also rebuts petitioners' argument that the statute's terms are contradictory. See Petitioners' Brief at 39. Petitioners state correctly that § 2339B(b)(3) defines "expert advice or assistance" as including "scientific ... [or] technical knowledge." Thus defined, this term may cover conduct not addressed by another statutory term, such as "training." See 18 U.S.C. § 2339A(b)(2) (defining "training" as "instruction ... designed to impart a specific skill"). For example, the prohibition in

§ 2339A(b)(3) on sharing "scientific [or] technical ... knowledge" would bar an individual from imparting knowledge of general principles of nuclear physics to a DFTO or its members. The prohibition on "training," which bars interactive teaching about specific matters related to the DFTO, would not cover provision of the general material about nuclear physics. See generally Petitioners' Brief at 39. However, this difference in coverage does not render the statute's terms contradictory. In enacting a criminal statute, Congress is free to craft separate terms that reach a range of conduct that it views as dangerous. Such terms are not conflicting, but complementary. See *Rubin v. Garvin*, 544 F.3d 461, 469 (2d Cir. 2008). Congress clearly believed that providing a DFTO even with general texts on physics, chemistry, biology, or engineering would pose an unacceptable risk. The Constitution does not preclude Congress from making this policy choice.

Despite their vagueness arguments, a clear look at the actual practice of petitioners and *amici* supporting their position demonstrates the ease of compliance with the statute's terms. On its web site, petitioner Humanitarian Law Project (HLP) has readily distinguished between independent advocacy and conduct barred by the statute. Comments featured on the site urge the Sri Lankan government to consult with the LTTE and include "Tamil ... military forces" in negotiations.[11] HLP's stance demonstrates that the statute has not chilled independent advocacy. Similarly, Human Rights Watch has produced many reports documenting human rights concerns about the Sri Lankan conflict. See, *e.g.*, Human Rights Watch, Sri Lanka Under Siege (Jan. 19, 2009), http://www.hrw.org/en/news/2009/01/29/sri-lanka-under-siege (discussing latest effects of conflict between LTTE and government). The statute has evidently not deterred Human Rights Watch from performing its independent factfinding role. Despite petitioners' claims, nonprofit organizations regularly engage in independent advocacy and factfinding, and avoid the concrete collaboration that the statute forbids.

---

[11] *See* Comm'n on Human Rights, United Nations, *Statement of the International Educational Development, available at* http://hlp.home.igc.org/docs/Sri_Lanka_Statement.htm (last visited Dec. 22, 2009).

In the final analysis, petitioners' quarrel is not with the clarity of the statute's commands, but with the congressional policy judgment underlying the statute's comprehensive framework. That framework already includes clear exceptions for independent advocacy and fact-finding, expressive membership, and properly licensed legal advice. Vagueness doctrine does not require more elaborate distinctions. This Court should decline petitioners' invitation to use vagueness doctrine as a vehicle for second-guessing Congress's policy choices in the complex realm of foreign affairs.

CONCLUSION

This Court should affirm those portions of the decision below which upheld the statutory bars on provision of "personnel" and "expert advice or assistance" involving "scientific" and "technical" knowledge. It should reverse the holding below striking down as unconstitutionally vague the prohibitions on providing "training," "expert advice or assistance" in the form of "specialized" knowledge, and "service" to a DFTO.

Respectfully submitted,

PROF. PETER MARGULIES
ROGER WILLIAMS
UNIVERSITY SCHOOL OF
LAW
10 Metacom Avenue
Bristol, RI 02809
(401)254-4564

BRADFORD A. BERENSON*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

December 23, 2009

* Counsel of Record

APPENDIX

APPENDIX

Amici Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues include the following individuals:

James J. Benjamin, Jr., Akin Gump Strauss Hauer & Feld (formerly Deputy Chief Appellate Attorney and Assistant United States Attorney, Southern District of New York), co-author (with Richard B. Zabel), *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008), http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

Marion "Spike" Bowman, formerly Deputy General Counsel and Senior Counsel, National Security Law, Federal Bureau of Investigation.

Paul Butler, Akin Gump Strauss Hauer & Feld (formerly Assistant United States Attorney, Southern District of New York; Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict; Special Assistant to the Secretary of Defense).

Robert M. Chesney, Charles I. Francis Professor of Law, University of Texas (former advisor, Detention Policy Task Force, United States Departments of Justice and Defense), author, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. 1 (2005); co-author (with Jack Goldsmith), *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079 (2008).

Nathan F. Garrett, Graves Bartle Marcus & Garrett (formerly Assistant United States Attorney, Northern District of Texas and member, Terrorist

Financing Task Force, United States Department of Justice).

Stephen J. Landes, Wildman Harrold Allen & Dixon, co-counsel for plaintiffs in *Boim v. Holy Land Foundation*, Adjunct Professor, trial practice and discovery, Northwestern University School of Law.

Nathan Lewin, Lewin & Lewin, co-counsel for plaintiffs in *Boim v. Holy Land Foundation* (formerly Assistant to the Solicitor General and Deputy Assistant Attorney General, Civil Rights Division, United States Department of Justice).

Alyza D. Lewin, Lewin & Lewin, co-counsel for plaintiffs in *Boim v. Holy Land Foundation*.

Kelly Moore, Morgan Lewis & Bockius (formerly Chief of the Violent Crimes and Terrorism Section and Assistant United States Attorney, Eastern District of New York).

Michael A. Newton, Professor of the Practice of Law, Vanderbilt University (formerly Senior Advisor to the United States Ambassador-at-Large for War Crimes Issues, United States Department of State).

Peter Raven-Hansen, Glen Earl Weston Research Professor of Law, George Washington University, co-author (with Stephen Dycus, Arthur L. Berney & William C. Banks), *National Security Law* (4th ed. 2007), co-counsel for plaintiffs, who are victims of terrorist attacks or the survivors of victims, in lawsuits against alleged financiers of terrorism, including *Linde v. Arab Bank, PLC*, No. 04-cv-2799 (E.D.N.Y.) and *Weiss v. National Westminster Bank, PLC*, No. 05-cv-4622 (E.D.N.Y.).

Daniel C. Richman, Paul J. Kellner Professor of Law, Columbia University (formerly Chief Appellate Attorney and Assistant United States Attorney, Southern District of New York), author, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 Duke L.J. 2087 (2009).

Robert F. Turner, Professor, Associate Director, Center for National Security Law, University of Virginia (formerly Principal Deputy and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs; Counsel, President's Intelligence Oversight Board).

Benjamin Wittes, Senior Fellow, Governance Studies, Brookings Institution, author, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Books 2008).

Lee S. Wolosky, Boies Schiller & Flexner (formerly Director for Transnational Threats, National Security Council).

Philip Zelikow, White Burkett Miller Professor of History, University of Virginia (formerly Counselor, United States Department of State, and Director, 9/11 Commission).

AMICUS
CURIAE
BRIEF

144 ⑦ ⑨

Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

Nos. 08-1498 and 09-89

IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* VICTIMS OF THE MCCARTHY ERA, IN SUPPORT OF HUMANITARIAN LAW PROJECT, ET AL.

Stephen F. Rohde
Rohde & Victoroff
1880 Century Park East
Suite 411
Los Angeles, CA 90067
(310) 277-1482

John A. Freedman
(*Counsel of Record*)
Jonathan S. Martel
Jeremy C. Karpatkin
Bassel C. Korkor
Sara K. Pildis
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for *Amici Curiae*

TC+TA
58xx2m

691

49

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Americans Paid a Heavy Price For McCarthy Era Penalties on Speech and Association 4

II. The Supreme Court in the 1950s and 1960s Rejected McCarthy Era 'Guilt by Association' Statutes as Impermissible 9

- A. AEDPA Penalizes the Relationship Between an Individual and a Designated Organization, in Violation of the Freedom of Association 10
  - 1. Congress Cannot Impose a "Blanket Prohibition" on Association With Groups Having Legal and Illegal Aims 10
  - 2. The Government Must Prove that Individuals Intend to Further the Illegal Aims of an Organization 12

B. Like McCarthy Era Statutes, AEDPA Makes Constitutionally Protected Speech a Crime and is Unconstitutionally Vague, Chilling Free Speech 14

  1. AEDPA Unconstitutionally Penalizes Protected Speech in the Same Manner as McCarthy Era Laws 14

  2. AEDPA Chills Protected Speech 17

C. National Security Concerns Cannot Justify Infringements on Freedom of Association 20

CONCLUSION 23

APPENDIX: *AMICI CURIAE* A1

TABLE OF AUTHORITIES

Page(s)

Cases

Adler v. Board of Education of City of New York, 342 U.S. 485 (1952) A1

Brandenburg v. Ohio, 395 U.S. 444 (1969) 14

Connally v. Gen. Constr. Co., 269 U.S. 385 (1926) 17

De Jonge v. Oregon, 299 U.S. 353 (1937) 16

Dennis v. United States, 341 U.S. 494 (1951) 15

Elfbrandt v. Russell, 384 U.S. 11 (1966) 11, 13

Hirabayashi v. United States, 320 U.S. 81 (1943) 21

Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) 21

Keyishian v. Bd. of Regents of the Univ. of the State of New York, 385 U.S. 589 (1967) .... *passim*

Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965) A11

NAACP v. Button, 371 U.S. 415 (1963) 17, 18

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 13, 16

Noto v. United States, 367 U.S. 290 (1961) 10, 12

Raley v. State of Ohio, 360 U.S. 423 (1959) A7

Scales v. United States, 367 U.S. 203 (1961) .... *passim*

Stromberg v California, 283 U.S. 359 (1931) A3

Stamler v. Willis, 287 F. Supp.734 (N.D. Ill. 1968) A9

United States v. Robel, 389 U.S. 258 (1967) .... *passim*

Whitney v. California, 274 U.S. 357 (1927) 15

Yates v. United States, 3[illegible]4 U.S. 298 (1957) 14, A9

Yellin v. U.S., 374 U.S. 109 (1963) A7

Statutes

18 U.S.C.§ 2385 (1994) 6

Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1189 .... 2, 16

Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 2339B 2, 16

N.Y. CIV. SERV. LAW § 105 (1958) 16

N.Y. EDUC. LAW § 3021 (1947) 16, 17

N.Y. EDUC. LAW § 3022 (1953) 16, 17

OHIO REV. CODE ANN. § 2923.13 (2004) 15

Other Authorities

Br. of Appellant United States, 1966 Westlaw 100448, *United States v. Robel*, 389 U.S. 258 (1967) 14, 20, 21

Commager, *Freedom and Order: A Commentary on the American Political Scene* 73-74 (1966) 8

Exec. Order No. 10450 (Apr. 27, 1953) 7

Exec. Order No. 9,835 (Mar. 21, 1947) 6

Petition for Writ of Certiorari 19

Schrecker, Ellen, *Many Are the Crimes: McCarthyism in America* (1998) .... *passim*

Stone, Geoffrey, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism* (2004) 5, 8

Stone, Geoffrey, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387 (2006)... 6, 7

INTEREST OF *AMICI CURIAE*

Amici are 32 individuals and the close family members of individuals who were subject to criminal penalties, a "blacklist" that precluded them from employment in their professions, or other governmental and social sanctions during the "Red Scare" from the 1930s to the 1960s, and especially during the "McCarthy Era" of the 1950s. They were punished for their lawful activity in or association with organizations the government labeled as subversive. Some *Amici* were punished, and even imprisoned, for refusing to testify before congressional committees. Some lost their jobs for failure to testify before state investigative bodies. Some were unable to find work in their field for years. Some left the country because they could not find work or because they feared prosecution. In many cases, the persecution included harassment of the family members and children of the targeted individuals. *Amici* have a strong interest in ensuring that these excesses are not repeated, that political speech is not quashed, and that dissenting individual views and associations are protected. Their stories are described in the Appendix to this Brief.[1]

---

[1] Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. §§ 1189 and 2339B, recreate the kind of criminal penalties for free speech and association that *Amici* and their families unjustly suffered more than fifty years ago. AEDPA authorizes the Secretary of State to designate "foreign terrorist organizations," and makes it a crime to provide certain statutorily defined "material support" for even the nonviolent and humanitarian activities of such groups. *Id.* Similar to the Smith Act and federal executive orders in the 1940s and 50s, AEDPA grants the Executive Branch unreviewable discretion to designate groups as "terrorist." AEDPA further creates vague bans on providing "expert advice or assistance," "training," "service," or "personnel" to designated groups. It threatens once again unconstitutionally to interfere with the rights of free speech and association.

AEDPA's vague ban on "assistance" and "advice" is essentially no different from the McCarthy Era attempt to root out association with and advocacy for groups unpopular with the government. Starting in the 1930s, and through the 1960s, Congress and the Executive Branch identified organizations -- the Communist Party and groups identified as having ties to the Communist Party -- as using illegal means, including terrorism, with the aim of overthrowing the United States Government by force and violence. The Smith Act and the Subversive Activities Control Act made it a crime to associate with these designated groups or to speak in support of these groups. These were crimes regardless of whether or not that speech or association supported or furthered the group's unlawful activities.

Our society now recognizes that the McCarthy Era was a shameful episode in American history, characterized by widespread abuses of executive and legislative power and fueled by demagoguery and overzealous government action, ultimately encompassing "loyalty" investigations of over four million American citizens. *See, e.g.*, Ellen Schrecker, ***Many Are the Crimes: McCarthyism in America*** (1998), at x (The McCarthy Era is "the most widespread and longest lasting period of political repression in American history.").

While few individuals were ultimately prosecuted under the McCarthy Era laws, thousands were persecuted. Among the latter, larger group were *Amici* and their relatives, none of whom intended to or actually did engage in violence against this country. Nonetheless, they were investigated, libeled, terminated from and unable to secure employment, blacklisted, prosecuted, and imprisoned. One of the key lessons from this era is that when the federal government fans the flames of public passion by enacting overreaching criminal statutes, staging congressional hearings, and investigating the loyalty of millions of American citizens, it implicitly condones and sanctions retributions against individuals, such as *Amici*. Eventually, our society and this Court understood that these consequences were unacceptable. We should not make these mistakes again.

It is against this background that this Court issued the decisions that are the controlling law that governs this case. In a series of landmark First Amendment decisions, this Court struck down these statutes, restored freedom of speech and halted guilt by association. This Court concluded that the congressional and executive branch excesses were unconstitutional. The Court held that punishing speech without showing incitement to crime and punishing association without showing specific intent to further illegal ends penalizes innocents and chills the political freedoms at the very core of our democracy.

These principles are equally applicable today, where the federal government (once again) has designated certain organizations as proscribed and purports to make it a crime to speak for or otherwise associate with such organizations. Now, when once again our safety and security have been threatened, this Court should reaffirm the rights to free speech and association.

ARGUMENT

I. AMERICANS PAID A HEAVY PRICE FOR MCCARTHY ERA PENALTIES ON SPEECH AND ASSOCIATION.

In periods of serious external threats to our Nation, the political branches of our government have sought to root out and punish individuals and organizations based on association with those designated as enemies of the State, even if such association was through constitutionally protected speech and activities. *See generally*, Geoffrey R.

Stone, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism* (2004). Beginning after the Bolshevik Revolution of 1917 and the establishment of a communist government in Russia, there was a period of fear and paranoia in America that international communism might destroy this country. In the 1950's, Senator Joseph McCarthy became among the most vocal and visible proponents of government investigations into individual citizens' affiliations with, or sympathies for, Communism. At the height of the McCarthy Era, the House Committee on Un-American Activities ("HUAC") held hearings in which individuals were publicly interrogated about their mere association with, or speech in support of, an organization identified as "Un-American."

Amici personally paid the price for the restrictions on freedom of speech and policies of guilt-by-association during the McCarthy Era. Individuals suffered greatly from "blacklists" that arose out of such hearings: private businesses (including the entertainment industry) and government employers stopped employing and fired individuals who government authorities identified as linked to communists, and those who refused to cooperate were jailed on charges of contempt. *See generally* Schrecker, *supra* (1998). Those who were blacklisted included renowned artists, performers, and writers, including: *amicus* Irwin Corey, a well-known comedian and film actor; *amicus* Clifford Carpenter, a famous radio, television and film actor; entertainer Lionel Stander, father of *amicus* Bella Stander; composers E. Y. Harburg, step-father of *amicus* Roderic Gorney, and Jay Gorney, father of *amicus* Roderic Gorney and husband of *amicus*

Sondra Gorney; screenwriter Robert Lees, father of *amicus* Richard Lees; and actors John Randolph and Sarah Cunningham, parents of *amici* Harrison Randolph and Martha Eoline Randolph. Speech was chilled as people feared government penalties that led to social ostracization; at the height of the furor, few dared to speak out against violations of civil liberties. *Id.*

Ill-conceived unconstitutional restrictions on the freedoms of speech and association enacted to protect against the evils of communism furthered and legitimized this repression. The Smith Act made it a crime to advocate, advise, teach, or publish material espousing the "duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence," and prohibited organizing any group that teaches or advocates the "overthrow or destruction of any such government by force or violence." 18 U.S.C. § 2385. Significantly, the Smith Act even made it a crime merely to become a member of, or affiliated with, any such society or group. *Id.* The Smith Act resulted in more than one hundred prosecutions based on involvement with the Communist Party, Stone, Geoffrey, "Free Speech in the Age of McCarthy: A Cautionary Tale," 93 CAL L. REV. 1387 (2006), including *amicus* Paul Harris' uncle and Communist Party leader Fred Fine, whose brother-in-law Sydney Harris was also blacklisted and unable to find a job because he joined the Communist Party after fighting in the Spanish Civil War.

The federal government also issued executive orders to crack down on communism during the

McCarthy Era. On March 21, 1947, President Harry Truman issued Executive Order 9,835, requiring loyalty checks on federal employees. The Executive Order authorized the Attorney General to designate specific groups as "totalitarian, fascist, communist, or subversive" or dedicated to "force or violence." Exec. Order No. 9,835 at III. The program authorized government panels to investigate employees for "membership in, affiliation with, or sympathetic association with" any designated organization, and to place such employees' names on a "master index," and recommend them for dismissal from employment. Exec. Order No. 9,835 at V.2.6. The order afforded no individual or organization the right to contest the designation and there was no right to judicial review. By 1953, 254 organizations were included on the "subversive list." Stone, at 344. The procedures developed under the Truman loyalty program were the model for an expanded guilt-by-association policy, and thus "became standard within other federal agencies, state and local governments, and private institutions." Schrecker, at 274.

In 1953, President Eisenhower expanded the standard of "disloyalty" under Truman's program to include "any behavior, activities or associations which would tend to show that the individual is not reliable or trustworthy." Exec. Order No. 10450 (1953). "In their investigations of more than four million federal civilian employees, the government's two hundred loyalty boards did not uncover a single instance of actual espionage or subversive malfeasance." Stone, at 351. Historian Henry Steele Commager described the loyalty program as "an invitation to precisely that kind of witch-hunting which is repugnant to our constitutional system."

Commager, *Freedom and Order: A Commentary on the American Political Scene*, 73-74 (1966). The incitement and toleration of such personal persecution based on association and speech cast a chilling shadow on political discourse in America.[2]

The McCarthy Era spawned innumerable tales of hardships suffered by "political innocents whose jobs were lost and careers destroyed because they inadvertently associated with groups on the list." Schrecker, at 276. By the mid-1950s, "[l]oyalty programs, emergency detention plans, undercover surveillance, legislative investigations, and criminal prosecutions of Communists swept the nation." Stone, at 313. "Some 11,000 Americans had been fired for suspected 'disloyalty,' more than 100 had been prosecuted under the Smith Act, and more than 130 had been jailed for . . . refusing to cooperate with their interrogators." *Id* at 314.

Some courageous leaders -- including Corliss Lamont (husband of *amicus* Beth Keehner Lamont), who brought key cases to the Supreme Court; *amicus* Yolanda "Bobby" Hall, who challenged the constitutionality of HUAC and its subpoenas; and *amicus* Ann Fagan Ginger, who successfully contested a HUAC contempt citation -- emerged to challenge the worst of the excesses.

---

[2] The men and women called to testify before congressional committees had been among the most active and vocal progressive individuals of that era.

> The repression unleashed against them essentially silenced their voices. They became preoccupied with their own defense. Grappling with a loyalty-security case, coping with unemployment, or fighting criminal charges or deportation left little time or energy for other political work. In addition, though these people certainly cared about peace, unionization, and racial equality, they feared that active involvement with such causes might only lead to more harassment.

Schrecker, 367-68.

It is against this background that the Supreme Court's landmark First Amendment decisions of the 1950s and 1960s restoring freedom of speech and halting guilt by association should be assessed and applied in this case.

II. THE SUPREME COURT IN THE 1950s AND 1960s REJECTED MCCARTHY ERA 'GUILT BY ASSOCIATION' STATUTES AS IMPERMISSIBLE.

In the 1950s, at a time of national fear over the unprecedented threat posed by international communism, Supreme Court cases addressed the constitutionality of statutes and administrative action similar to AEDPA. Clear First Amendment and due process principles in those cases limit criminal liability for association with or advocacy on behalf of designated "subversive" organizations. These principles apply directly to AEDPA. AEDPA does not comply with them, and accordingly is unconstitutional.

A. AEDPA Penalizes the Relationship Between an Individual and a Designated Organization, in Violation of the Freedom of Association.

In the aftermath of the McCarthy Era, this Court established clear limits on civil or criminal "guilt by association," In *Scales v. United States,* 367 U.S. 203 (1961), this Court rejected the Membership Clause of the Smith Act and established two related limits directly relevant to AEDPA: (1) the Constitution bars a blanket prohibition on association with groups with legal and illegal aims; and (2) the Constitution requires that criminal sanctions be limited only to individuals who specifically intend to further a designated group's illegal aims.

1. Congress Cannot Impose a "Blanket Prohibition" on Association With Groups Having Legal and Illegal Aims.

In *Scales,* this Court explained: "A blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired." *Id.* at 229. That same day, the Court also held that convictions under the Membership Clause of the Smith Act require the strictest possible standards, due to the danger that an individual supporting only the lawful aims of an organization "might be punished for his adherence to lawful and protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States,* 367 U.S. 290, 299-300 (1961).

In later cases, the Court affirmed and expanded this essential doctrine that association with a proscribed organization by itself cannot justify criminal liability. *See Elfbrandt v. Russell,* 384 U.S. 11, 19 (1966) (concluding that an Arizona law barring Communist party members from teaching in Arizona schools "infringes unnecessarily on protected freedoms" and "rests on the doctrine of 'guilt by association.'"); *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 607 (1967) (holding that even membership in the Communist Party by an individual with knowledge of the Party's unlawful goals "cannot suffice to justify criminal punishment.") (*citing Scales*).

AEDPA, in effect, similarly imposes a "blanket prohibition" on association with designated organizations (*i.e.*, whoever the government specifies), and would render conduct criminal on little more than a "guilt by association" theory. The statute prohibits individuals from interacting with the designated organizations in ways that advance legal aims of the organizations, such as providing training or expert advice on international human rights law or political advocacy, teaching community organizing, or providing instruction in principles of non-violent resistance. Indeed, the sweep of the statute is so vast that it potentially encompasses activities that neither "support" a group nor are "material." Criminalizing broad categories of "training," "expert advice," or "service" certainly encompasses activities that are not "material," and accordingly, there is no discernible difference between "material support" and mere association. As such, AEDPA criminalizes behavior that promotes the group's "lawful and protected purposes," contrary to *Scales* and *Noto*.

2. The Government Must Prove that Individuals Intend to Further the Illegal Aims of an Organization.

This Court in *Scales* noted that requiring proof of an individual's specific intent to support the illegal aims of a proscribed organization is a corollary of the principle that the government may not impose a "blanket prohibition" on association with proscribed organizations. The Court explained:

> In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Scales, 367 U.S. at 224-25.

The Court construed the Smith Act Membership Clause as not rendering "criminal all association with an organization which has been shown to engage in illegal advocacy" but requiring "clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.'" *Id.* at 229 (*citing Noto,* 367 U.S. at 290). A conviction is only appropriate where the government puts forward "proof that [the defendant] knew that the organization engaged in criminal advocacy, and that it was his purpose to further that criminal advocacy." *Id.* at 227, n.18.

The Court has repeatedly reaffirmed this specific intent requirement. *See Elfbrandt,* 384 U.S. at 19 ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and "rests on the doctrine of 'guilt by association' which has no place here."); *Keyishian,* 385 U.S. at 608 ("[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates the constitutional limitations."); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 920 (1982) ("civil liability may not be imposed merely because an individual belonged to a group . . . . For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

Indeed, in the face of this long line of cases, the government eventually acknowledged in defending McCarthy Era statutes that it was required to demonstrate "specific intent," a requirement it now disavows in defending AEDPA. For example, in *United States v. Robel,* 389 U.S. 258 (1967), in defending the provision of the Subversive Activities Control Act allowing summary termination of employees of defense contractors, the government acknowledged that specific intent was required for criminal convictions, stating flatly that to treat "association, in and of itself, as criminal conduct . . . would conflict squarely with the First Amendment." *See* Appellant United States Br. at 47-48, *Robel, supra.*[3]

AEDPA makes association a crime without regard to the specific intent of the individual to support the illegal activities of a designated organization. It violates this crucial constitutional requirement that this Court established in the McCarthy Era cases and that applies with equal force today.

B. Like McCarthy Era Statutes, AEDPA Makes Constitutionally Protected Speech a Crime and is Unconstitutionally Vague, Chilling Free Speech.

1. AEDPA Unconstitutionally Penalizes Protected Speech in the Same Manner as McCarthy Era Laws.

In challenges to the application of the Smith Act, this Court found that advocating or teaching the violent overthrow of the government, even with an evil intent, is protected speech as long as it is "divorced from any effort to instigate action to that end." *Yates v. United States,* 354 U.S. 298, 318 (1957); *see also id.* at 331. Even where individuals have advocated for the overthrow of the United States Government, that speech is protected unless "the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crimes. . . ." *Dennis v. United States,* 341 U.S. 494, 505 (1951).

---

[3] The Court was unpersuaded by this distinction, and struck the statutory scheme in *Robel* as unconstitutional, because the bar on employment "literally establishe[d] guilt by association alone, without any need to establish that an individual's association pose[d] the threat feared by the Government in proscribing it." *Robel,* 389 U.S. at 264-65.

The Court elaborated the standard for evaluating legislative restrictions on teaching and advocacy in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In *Brandenburg,* the Court struck down the Ohio Criminal Syndicalism Act because the act punished "mere advocacy," even though the speech advocated illegal activity. The Ohio Criminal Syndicalism Act, which was nearly identical to similar laws adopted by 20 states, punished persons who "advocate or teach the duty, necessity, or propriety" of violence as a means of "accomplishing industrial or political reform...." Ohio Rev. Code Ann. § 2923.13 (1969). The Court, overruling its previous decision in *Whitney v. California,* 274 U.S. 357 (1927), held that the government cannot penalize advocacy or teaching of the use of force or violating the law unless it can prove that the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447.

As interpreted by the government, AEDPA makes association a crime, including teaching or advocating on behalf of any designated organization, and AEDPA is strikingly similar to the language of the Smith Act and the Ohio Criminal Syndicalism Act. On its face, AEDPA prohibits speech that is not "directed to inciting or producing imminent lawless action" and is not likely to "incite or produce such action." *See* 8 U.S.C. §§ 1189, 2339B. Furthermore, the speech that AEDPA prohibits is speech advocating lawful activity, and the Court in cases such as *Dennis* and *Brandenburg* disapproved statutory interpretation that allowed the government to restrict speech advocating even unlawful activity. For example, AEDPA prohibits the teaching of law or human rights, or providing advice on water sanitation to designated organizations. The statute even apparently bars drafting an *amicus* brief in support of a designated organization or advocating on behalf of a designated organization before the United States Government or the United Nations.

Whether or not the executive branch has concluded that an organization engages in illegal conduct, the First Amendment protects the rights of individuals to speak, teach or provide advice to such organizations -- certainly where such speech is in furtherance of non-violent or other legal aims of the organization. *Cf. De Jonge v. Oregon* 299 U.S. 353 (1937) (reversing conviction under Oregon criminal syndicalism law of individual who helped organize Communist Party meeting in 1934); *Claiborne Hardware Co.*, 458 U.S. at 908 (individuals who advocate on behalf of an organization do "not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."). Such groups may be unpopular. But the First Amendment protects even those who speak to or on behalf of unpopular organizations.

2. AEDPA Chills Protected Speech.

During the McCarthy Era, fear of enforcement of statutes such as the Smith Act and the Ohio Criminal Syndicalism Act caused individuals to refrain from engaging in protected speech or associating with designated organizations. Likewise, here, AEDPA creates the danger of chilling the exercise of First Amendment rights.

In *Keyishian, supra* the Court found unconstitutionally vague a New York statute making "treasonable" or "seditious" words or acts grounds for removal from state employment. *Keyishian*, 385 U.S. at 597-99, N.Y. EDUC. LAW §§ 3021, 3022; N.Y. CIV. SERV. LAW § 105. In striking down the statute, the Court found that the "First Amendment freedoms need breathing space to survive..." and emphasized the danger of a "chilling effect upon the exercise of vital First Amendment rights."[4]

---

[4] A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is "sufficiently clear so as not to cause persons 'of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application.' *Connally v. General Constr. Co.*, 269 U.S. 385, 391(1926).

In *Keyishian*, the Court found that no state employee "can know just where the line is drawn between 'seditious' and nonseditious utterances and acts." *Id.* at 599. The same New York statute prohibited state employment by any person who "advocates, advises or teaches the doctrine" of forceful overthrow of the government. *See* N.Y. EDUC. LAW §§ 3021, 3022; N.Y. CIV. SERV. LAW § 105. The Court found that "[t]his provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others or incite others to action in furtherance of unlawful claims." *Keyishian*, 385 U.S. at 599.

Keyishian, 385 U.S. at 604. *See generally, NAACP v. Button*, 371 U.S. 415 (1963) ("the threat of sanctions may deter [the exercise of First Amendment Rights] almost as potently as actual application of the sanctions").

Local and state governments relied on statutes similar to New York's to terminate numerous dedicated teachers across the United States without any evidence of unlawful or violent activity. *Amicus* Irving Adler and Samuel Wallach (father of *amicus* Joan Wallach Scott), were fired from New York City teaching jobs for resisting inquiries into their political beliefs; *amicus* Chandler Davis lost his teaching job at the University of Michigan after refusing to testify and was imprisoned after being cited for contempt of Congress; *amicus* Henry Foner was denied a teaching license and his three brothers lost their New York teaching jobs after their "loyalty" testimonies; *amicus* Lee Lorch lost his position at Fisk University for refusing to answer HUAC's questions; Yetta Stromberg, great-aunt of *amicus* Judy Branfman was fired from teaching positions with UCLA and Los Angeles public schools; renowned philosopher Barrows Dunham, father of *amicus* Clarke Dunham, lost his position at Temple University; Frank and Jean Wilkinson, parents of *amicus* Jo Wilkinson, lost their jobs after refusing to testify before a California committee; and Dr. Robert Hodes, father of *amicus* Peter Hodes was fired from Tulane University and had to move abroad to continue his career.

Even children were not immune from the chilling effects of such restrictions on speech and association: FBI agents questioned classmates and playground friends of *amici* siblings Ernst and Jessica Benjamin when they were schoolchildren, because their parents Herbert and Lillian Benjamin had been blacklisted.

AEDPA similarly creates fear of prosecution for groups and individuals today who would lawfully advocate on behalf of designated organizations or provide those organizations with advice and training relating to lawful activities. In 1951, when HUAC agents attempted to subpoena them, *amici* Jean and Hugo Butler chose to flee to Mexico to avoid arrest. *Amicus* Walter Bernstein, a blacklisted writer in the 1950s, was forced to write under a pseudonym. Screenwriter Michael Wilson, father to *amici* Becca Wilson and Rosanna Wilson-Farrow, had to write "under the table" and did not receive credit for his work, including Oscar-winning films *Bridge Over the River Kwai* (1957) and *Lawrence of Arabia* (1952). Hollywood Ten screenwriters Sam Ornitz, father-in-law of *amicus* Hilda Ornitz, and Adrian Scott, husband, uncle, and great uncle of *amici* Joan Scott, Aemelia Scott, Adam Scott, and Douglas Scott, served nine months in prison and had their careers destroyed for refusing to testify before HUAC.

Like the statutes in *Keyishian*, AEDPA "is plainly susceptible of sweeping and improper application." *Keyishian*, 385 U.S. at 599. The chilling effect on lawful speech is reminiscent of the McCarthy Era where people feared speaking on behalf of or associating with designated groups in part because it was unclear what speech might trigger government action.

The Court should protect those who want lawfully to exercise their First Amendment rights from this sort of vague statute that uses ill-defined and undefined terms to make speech a crime.

C. National Security Concerns Cannot Justify Infringements on Freedom of Association.

The government defends AEDPA on national security grounds. *See Petition for Writ of Certiorari*, at 11 (citing congressional findings that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States"). When the government argued in the 1940s, 50s, and 60s that the national security threat posed by international communism justified infringements on rights of speech and association, this Court closely scrutinized such claims to ensure that the means are narrowly tailored to serve the national security interest. As this Court noted then, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *Robel*, 389 U.S. at 263.

In *Robel*, the government argued that the threat of international communism in the aftermath of the Korean War made it "plain beyond all doubt that communism has passed beyond the use of subversion to conquer the independent nations and will now use armed invasion and war." Government Br. at 22, *Robel*, *supra* (cites and quotes omitted). The government contended that the Communist Party "can no longer be viewed passively as a group of mere political and ideological dissidents, but must be looked upon with all seriousness as a military fifth column actively aiding our enemies." *Id.* at 22. The government cited congressional reports warning of "sabotage" by "hard-core Communists" "which action would coincide with surprise attacks on the country." *Id.* at 26. The government even invoked the now-discredited arguments of *Hirabayashi v. United States,* 320 U.S. 81 (1943) (upholding imposition of a blanket curfew only on Japanese Americans during World War II, absent any evidence of individual guilt or misconduct) to claim that it was owed "the very broad discretion which has traditionally been vested in the legislative and executive branches of government in the area of war and national defense." *Robel* Br. at 29-30 (times of war "call for the exercise of judgment and discretion and for the choice of means by those branches of government on which the Constitution has placed responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs").[5]

In the face of these claims, this Court responded:

> [The] concept of national defense cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term national defense is the notion of defending

---

[5] The doctrine of *Hirabayashi* has been widely discredited as an abdication of the Court's historic defense of constitutional rights. *See, e.g., Hirabayashi v. United States,* 828 F.2d 591, 593 (9th Cir. 1987).

> those values and ideals which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in the Constitution, and the most cherished of those ideals is found in the First Amendment. It would be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.

Robel, 389 U.S. at 263-64.

The *Robel* Court concluded that despite the government's broad invocation of national security, the "means the Government has chosen to implement" its purpose was not narrowly tailored and violated the right to free association, because the government was not required to prove that any individual in fact engaged in any activity that posed a risk to national security: "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the government in proscribing it." *Id.* at 265. Likewise here, AEDPA punishes speech without a showing of incitement to crime, and it punishes association with designated organizations without establishing that an individual's association poses a threat. As such, AEDPA is not narrowly tailored to serve an interest in national security and is unconstitutional.

CONCLUSION

For all of the above reasons, and in accordance with the request of Plaintiffs Humanitarian Law Project et al., the Court should affirm the court of appeals' decision with respect to the provisions it held invalid as applied to plaintiffs' speech, and reverse the court's decision with respect to the provisions it upheld.

Respectfully submitted,

John A. Freedman
(*Counsel of Record*)
Jonathan S. Martel
Jeremy C. Karpatkin
Bassel C. Korkor
Sara K. Pildis
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Stephen F. Rohde
Rohde & Victoroff
1880 Century Park East
Suite 411
Los Angeles, CA 90067
(310) 277-1482

Attorneys for *Amici Curiae*

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Irving Adler is a prominent mathematician and math educator, who has authored or co-authored more than 80 books on mathematics, science and education. Adler started his career in 1932 as a math teacher in New York City public schools. He lost his position in 1954 when he refused to answer questions from the New York Superintendent of Schools about his political beliefs. Adler was a plaintiff in a Supreme Court lawsuit challenging the constitutionality of the New York "Feinberg" law, providing for dismissal of teachers belonging to "subversive organizations." *Adler v. Board of Education of City of New York,* 342 U.S. 485 (1952). The Supreme Court upheld the Feinberg law, but later reversed in *Keyishian, supra.*

Ernst and Jessica Benjamin are the son and daughter of Herbert and Lillian Benjamin. Ernst is a political scientist and retired General Secretary of the American Association of University Professors. Jessica Benjamin is an internationally known psychoanalytic psychologist and author. Herbert Benjamin was active in the hunger marches of 1930 and 1932, the Unemployed Councils, the campaigns for social insurance, and the Worker's Alliance. He professed his Communist Party membership in congressional testimony in the late 1930s but refused to testify about others after he left the Party about 1946. The Benjamin family was subject to recurrent FBI surveillance both before and long after Herbert Benjamin left the Communist Party, including workplace and neighborhood investigative interviews and deportation efforts intended to persuade Herbert Benjamin to testify about the activities of others. The Benjamin children were subject to their mother's anxiety about their father's possible deportation, and to harassment at school such as a teacher repeatedly lecturing Jessica on the virtues of Senator McCarthy and a school administrator who noted "needs political guidance" in Ernst's high school record. Ernst's focus on academic freedom has familiarized him with the parallels between "McCarthyism" and current excessive constraints on academic speech and association arising from the "war on terror." Jessica has taught and studied in Chile, Argentina, Germany, and Israel where she has observed and discussed with other mental health professionals how political persecution deprives children of the orderly interpersonal environment that nurtures fully functional adults.

Walter Bernstein is a writer who was blacklisted in the 1950s by HUAC. After being blacklisted, he continued to write under pseudonyms. He was nominated for an Oscar for writing The Front, the Woody Allen/Martin Ritt film about the blacklist. He is a recipient of The Writers Guild of America East Lifetime Achievement Award and he also wrote the book "Inside Out: A Memoir of the Blacklist".

Judy Branfman is the great-niece of Yetta Stromberg. As a 17-year-old leader of the Young Pioneers (the youth organization of the Communist Party) in Los Angeles, she ran a summer camp for working class children. In 1929, the camp began to fly a homemade red flag in the morning and within days it was raided and shut down. Stromberg was sentenced to 1 to 10 years in San Quentin Prison for violating California's "Red Flag Law," which criminalized displaying a red flag. Stromberg appealed her conviction and the U.S. Supreme Court found portions of the law unconstitutionally vague. *Stromberg v California*, 283 U.S. 359 (1931). While the case set precedent for hundreds of free speech and civil rights cases, the FBI continued to track Stromberg for decades because of her early activism and suspected membership in the Communist Party. She was blacklisted and fired from teaching jobs with UCLA and Los Angeles public schools during the 1940s and 50s. Although never called before HUAC, she lived in constant fear of a subpoena. Prevented from fulfilling her true goals as an educator, she taught in private schools and very rarely talked about her case with anyone.

Jean Rouverol Butler is an author, actress and screenwriter whose husband, screenwriter Hugo Butler, was blacklisted in the 1940s. During that time period, Hugo Butler published under Jean Rouverol Butler's name. In 1951, in order to avoid being subpoenaed by HUAC, she and her husband fled to Mexico, thereby avoiding facing prison sentences for failing to answer questions. She returned to the United States in mid-1960s. The author of several books, in 2001 she published "Refugees from Hollywood: A Journal of the Blacklist Years."

Clifford Carpenter is an actor who was blacklisted in the late 1940s for his political views, and for years was unable to get work in radio, television and film. He was called before HUAC while in a play by Dore Schary called *Sunrise at Campobello* about Franklin Delano Roosevelt.

Carpenter refused to answer questions about his prior involvement in the Communist Party before the Committee. Carpenter led the struggle against the blacklist in the New York local of the American Federation of Television and Radio Artists. He acted in a number of Broadway hits as well as hundreds of radio shows, including playing Terry on the popular radio series, "Terry and the Pirates."

Irwin Corey is a prominent comedian, performer and satirist. He was blacklisted during the 1950s for his left-wing political opinions. As a result of the blacklist he was unable to get the kind of work that his talent and experience would have permitted. Due to the after-effects of the blacklist, Corey was not able to get work on television and movies until the 1970s and 1980s.

Professor H. Chandler Davis (Ph.D. Harvard 1950) was a non-tenured junior faculty member at the University of Michigan when he was questioned by the HUAC in 1954. Refusing to answer was easy: one simply had to invoke the Fifth Amendment protection against self-incrimination. Davis avoided doing so, deliberately incurring indictment for contempt of Congress. He hoped to argue, on appeal to the Supreme Court, that the HUAC hearings were unconstitutional under the First Amendment. His appeal was denied certiorari, and he served time in Danbury Federal Correctional Institution. Blacklisted permanently from regular employment in his profession in the United States, he has had a successful professional life since 1962 at the University of Toronto (but retained his U.S. citizenship). This included vice presidency of the American Mathematical Society 1991-1994; and many guest lectureships, including in the U.S. In 1990, the University of Michigan Senate Assembly established a special lecture on Academic and Intellectual Freedom in honor of Davis and two other Michigan faculty members fired for refusing to testify before HUAC.

Clarke Dunham is the son of Barrows Dunham, whose book, *Man Against Myth*, a New York Times best-seller in 1947, made him a spokesman for American progressive thought, drawing the attention of the FBI which then tracked which university classrooms used the book as a text. A compelling speaker, Barrows Dunham appeared at many events, and those events appeared within his FBI files. Many friends and acquaintances became victims of the Un-American Activities Committees and professional blacklists. He tested the idea of becoming an ex-patriate, the choice of many others, but soon returned to America□ what he referred to as "God's Country". In February 1953, supported by Albert Einstein, Dr. Dunham was a candidate for a Ford Foundation grant when he was subpoenaed to appear before HUAC. Refusing to give the Committee more than his name, date and place of birth, he was quickly indicted for contempt of Congress. That same day the Ford Foundation denied the grant. Temple University suspended him from his position as professor and Chairman of the Philosophy Department the following day. Temple later fired Barrows for "intellectual arrogance" and "obvious contempt of Congress." His trial resulted in a directed verdict of acquittal and in fact established a legal landmark□ the point at which a person could legally and safely refuse to testify against one's friends and associates. His contempt no longer "obvious" and his defiance of government oppression vindicated, Temple nevertheless refused to reinstate him. Twenty-eight years later Temple did reinstate Barrows with a meager pension. Not only Barrows suffered. His wife, Alice Dunham, was forced out of her job at the Philadelphia Museum of Art. Several generations of the Dunham family endured financial hardship and emotional scars directly caused by the blacklist, and two generations of students shared the loss of a well loved and inspiring teacher.

Henry Foner and his three brothers (now deceased) were victims of the McCarthy-like Rapp-Coudert Legislative Committee investigating communism in New York public schools and colleges. Henry's brothers Phillip, Jack and Moe -- along with about fifty other City College teachers -- were suspended due to their political beliefs as a result of the Rapp-Coudert committee, and Henry was denied a public school teacher's license. Later, Philip taught at Lincoln University in Pennsylvania and authored close to 100 books on labor, Black and women's history. Jack taught at Colby College in Maine and was honored by the college upon his retirement there. Moe founded the world-renowned *Bread and Roses* cultural program at the Service Employees International Union - 1199. Henry received the Legion of Merit and Italian Military Valor Cross during his military service and went on to serve as president of the Fur, Leather & Machine Workers Union, covering workers in New York, New Jersey, Pennsylvania, Delaware and West Virginia for 27 years until his retirement in 1988.

Professor Ann Fagan Ginger was a victim and close family member of victims of the McCarthy Era "red scare." In 1954 the Harvard University Business School broke the contract of Ginger's husband, professor Ray Ginger, when the Gingers refused to answer questions about their political affiliations. He was blacklisted and could only get a teaching job in Canada for many years. This broke his marriage and led to his death at the age of 50 of alcoholism. Ann Ginger could not get admitted to practice law in Massachusetts, New York or California from 1952 until 1972 because she could not pass the FBI-administered "character" test. Nevertheless, during this period she argued and won a case in the U.S. Supreme Court contesting a contempt citation by the Ohio Un-American Activities Commission. *Raley v. State of Ohio,* 360 U.S. 423 (1959). In 1970, after ten years of editing books for the University of California Continuing Education of the Bar, she was fired when the FBI visited her new supervisor. Her brother-in-law, professor Edward Yellin, also suffered from blacklisting after refusing to answer questions before HUAC, although he won his case in the U.S. Supreme Court in 1963. *Yellin v. U.S.,* 374 U.S. 109 (1963).

Roderic Gorney is the son of Jay Gorney and the step-son of E. Y. Harburg. Together, Gorney and Harburg wrote "Brother, Can You Spare a Dime." With other composers, Harburg wrote the lyrics for "The Wizard of Oz," for which he won an Academy Award for the song "Somewhere Over the Rainbow," and "Finian's Rainbow," among other classic American musical works. Both Gorney and Harburg were listed in the initial Blacklist publication, "Red Channels." Harburg was named by a "friendly witness" before HUAC, actor Robert Taylor, based on lyrics to a song in a movie in which Taylor had starred. When asked by his studio, MGM, to testify before HUAC voluntarily, Harburg refused and responded that "Guilt by association is a European doctrine which has always been repudiated in this country, and it is about time that decent liberals and good Americans fought back. . ." Roy Brewer, the "keeper" of the Hollywood Blacklist, informed Harburg that he was labeled a "Red" based on a song he wrote for a 1940 musical starring Lena Horne, who was also blacklisted. In the hysteria of the McCarthy Era, Brewster accused Harburg of writing the song, "Happiness is Just a Thing Called Joe" as a tribute to Joseph Stalin. Harburg was blacklisted in Hollywood and denied a passport when he sought to leave the country. Roderic Gorney saw first-hand the devastating effect of "guilt by association" on his family and his family friends.

Sondra Gorney is the widow of Jay Gorney, the renowned composer of "Brother, Can You Spare a Dime" and other classic songs. In 1950, both Sondra and Jay Gorney were listed in Counterattack, a publication of the organization AWARE, as "reds." Among the reasons Jay was accused of being a Communist was that he had signed a statement issued by the National Council of Arts, Sciences and Professions (NCASP), calling for the abolition of HUAC. In 1952, both Sondra and Jay Gorney were subpoenaed to testify before HUAC, but only Jay Gorney appeared before the Committee. When asked "Are you now or have you ever been a Communist?", Gorney took the Fifth Amendment. Although he avoided going to prison, both he and Sondra lost their careers. The hysteria of the McCarthy Era cast a lasting pall on the

Gorney family, particularly their two young children who were six and eight at the time of the hearings.

Yolanda "Bobby" Hall was active in racial integration efforts in Chicago on behalf of the League of Women Voters in 1965 when she was subpoenaed to appear before HUAC and refused to give testimony. Hall is a founder of the Working Women's History Project and a former President of Local 330 of the United Automobile Workers Union. Hall was a plaintiff in *Stamler v. Willis,* 287 F. Supp.734 (D. Ill. 1968), a case challenging the constitutionality of the HUAC.

Paul Harris is a graduate of Boalt Hall law school and teaches at Golden Gate School of Law in San Francisco. He is the son of Sydney Harris, who joined the Communist Party while volunteering to fight fascism during the Spanish civil war. After returning to the U.S., Harris was blacklisted and unable to get a job in the labor movement. His phone was tapped by the government in 1952, and he was unable to get a job as a labor journalist until well after he left the Communist Party in the mid 1950s. Paul Harris is also the nephew of Fred Fine, a Communist Party leader indicted under the Smith Act in 1951. Fine went underground for four years and was tried and convicted after his voluntary surrender, despite the absence of evidence that he ever engaged in any act of violence. His conviction was reversed after the Supreme Court decision in *Yates, supra.* He resigned from the Party in 1957. He went on to become Commissioner of Culture for Chicago in 1984. Paul Harris' mother, Rose Fine, also an intermittent Communist Party member, was subject to continuous FBI investigation and harassment due to her brother's affiliation. She left the Party in 1952 and was fired from seven jobs between 1952 and the Fall of 1953, all after she had left the party. Each firing resulted from FBI visits to her employer. She was once threatened with felony prosecution for a minor offense unless she gave information about her brother. The FBI repeatedly harassed the family, visiting neighbors and relatives to ask questions, and once attempting to interrogate 8-year-old Paul.

Peter Hodes is the son of Dr. Robert Hodes, a victim of a McCarthy Era firing. Dr. Hodes was a neurophysiology professor at Tulane University who spoke out in favor of peace in opposition to the Korean War. He tried to integrate the housing for visiting professors attending conferences in New Orleans. He had cooperative relations with some scientists from the Soviet Union. He was fired in 1953 for expressing these unpopular political beliefs, but Tulane University disguised its political motivation and instead charged him with causing "friction" within his department. Dr. Hodes fought unsuccessfully to keep his job at Tulane through the university's internal review process. After he was fired, Dr. Hodes was blacklisted and unable to find another comparable job. Unable to find work in his field, Dr. Hodes moved, with his wife and three children, to England. Then, from 1954 until 1959, he and his family moved to China, where he was able to continue his professional career.

Beth Keehner Lamont is the widow of Dr. Corliss Lamont, a leading philosopher, teacher and defender of human rights. Dr. Lamont was a founder of the National Emergency Civil Liberties

Committee, which later became the Center for Constitutional Rights, and a Director of the American Civil Liberties Union from 1932 - 1954. As a consequence of his political beliefs, Dr. Lamont was investigated by Congress, cited for contempt of Congress, denied a passport by the State Department, and subject to FBI wiretaps and investigations of his finances. Dr. Lamont won a successful lawsuit against the U.S. Postmaster General for opening mail in violation of the First Amendment, *Lamont v. Postmaster General of the United States,* 381 U.S. 301 (1965). Dr. Lamont authored numerous books, including The Philosophy of Humanism.

Richard Lees is the son of Robert Lees. Robert Lees was a well-known screenwriter of comedies for Abbott and Costello, among others, when he was called to testify before HUAC. Lees refused to do so, telling the Committee that "a writer writes for the people, who are both his inspiration and his audience. The political freedom of the people guarantees the writers tools of his trade □freedom of thought and expression." For Lees, it was important that a "writer must also function as a citizen" to guarantee freedom of thought and expression. Lees was blacklisted from Hollywood. Having lost his profession, he moved his family from Hollywood and took a job as a maitre'd to support them. Although Lees later wrote for television under various pseudonyms, he never recovered his screenwriting career.

Professor Lee Lorch is a nationally and internationally recognized mathematician, elected to the Councils of the American and Canadian

Mathematical Societies, and a Fellow of the American Association for the Advancement of Science. He has received four honorary doctorates and other prestigious academic awards. He was elected as a Fellow of the Royal Society of Canada and served on its Council. Professor Lorch paid a heavy professional price, including being blacklisted, for his commitment to civil rights and equal opportunity for women and minorities. In the late 1940s, the Lorches participated prominently in the campaign to eliminate racial segregation in Stuyvesant Town, a housing development in New York City. As a result, Lee lost his position at City College of New York. Later he was dismissed from his position at Pennsylvania State University because he allowed an African American family to live in his Stuyvesant Town apartment. This was reported on the front page of The New York Times, and the paper published an editorial calling for his reinstatement. Lorch was summoned to testify before HUAC in 1955, after attempting to enroll his daughter in a neighborhood, African-American school in Nashville, Tennessee, where he and his family were living and working at the time. When Professor Lorch refused to answer a number of questions the Committee put to him, he was dismissed from his position at Fisk University and indicted for contempt of Congress. Although Professor Lorch was acquitted of the contempt charge, he was blacklisted. Finding himself unemployable in the U.S., he and his family moved to Canada in 1959, where Professor Lorch has had a distinguished career. He has remained a U.S. Citizen. During World War II, he served for three years in the U.S. Army and received an honorable discharge.

Dr. Hilda W. Ornitz is the daughter-in-law of screenwriter Sam Ornitz, one of the "Hollywood Ten." Ornitz was one of the oldest of the group of ten individuals subpoenaed as "unfriendly" witnesses before HUAC. Ornitz was also an organizer and board member of the Screen Writers Guild, the trade union organized in the mid-1930s as an answer to the Academy of Motion Pictures Arts & Sciences. Ornitz was called before HUAC in 1947 to answer questions about the Screen Writers Guild. He invoked his constitutional rights and refused to answer the Committee's questions. Ornitz was charged and convicted for contempt of Congress, and sentenced to a fine of $1,000 and a year in prison. He was blacklisted by Hollywood, and never again wrote for motion pictures. He died a few years after his release from prison.

Harrison Randolph and **Martha Eoline Randolph** are the children of Tony-award winning actors John Randolph and Sarah Cunningham. Both Randolph and Cunningham were blacklisted by the Hollywood studios after having been "named" for supporting progressive causes. They were unable to get film work, or work in radio or television in New York City, after 1951. They invoked their Fifth Amendment rights and refused to testify before the HUAC in 1955. Randolph was not rehired in Hollywood until 1966. After his return to Hollywood, Randolph was a board member of the Screen Actors Guild and other professional organizations. Randolph said he served on these boards as a living reminder not to forget or repeat the McCarthy Era.

Joan Scott, **Aemilia Scott**, **Douglas Scott**, and **Adam Scott** are the wife, great niece, nephew and great nephew, respectively, of Adrian Scott, a member of the so-called "Hollywood Ten," and a producer and screenwriter whose professional life was cut short by the Hollywood blacklist. As a consequence of political activity at Amherst College and in Hollywood, and especially after producing a film entitled "Crossfire" dealing with anti-Semitism in the U.S. Army, Adrian was brought before HUAC to explain his alleged ties to the Communist Party. Rather than taking the Fifth Amendment, Adrian and nine other members of the Hollywood community opted to invoke their First Amendment rights. Adrian argued before HUAC against guilt by association, stating, "I do not believe it is proper for this committee to inquire into my personal relationships, my private relationships, my public relationships." For this, and after being named by 'HUAC friendly' witnesses, he and the other members of the Hollywood Ten were blacklisted and jailed for contempt of Congress. Adrian spent nine months in prison. Adrian's Hollywood career was effectively ended, forcing him to write under a pseudonym, use a "front," and eventually leave the United States entirely to find work. He died in 1971, within a few years of returning to the U.S. Aemilia is herself working to become a screenwriter, and honors the principled stance that Adrian took and the price he paid for his dissent.

Joan Wallach Scott is a professor of Social Science at the Institute for Advanced Study in Princeton NJ. She is the daughter of Samuel Wallach, who was fired from his job as a New York City high school teacher in 1953. Sam Wallach refused to answer questions about his personal political beliefs in 1948 before a congressional investigating committee and then again when the Board of Education asked whether or not he was a member of the Communist Party. Nothing in Wallach's 18 year record as a teacher indicated that he was unfit to be in a classroom. It was the presumed danger of his political beliefs that led to his firing, and to the dismissal or forced resignation of some 350 New York City public school teachers during that period. In his statement to a congressional committee and the Board of Education, Wallach stated "As a teacher and believer in fundamental principles, it seems to me that it would be a betrayal of everything I have been teaching for me to cooperate with this committee in an investigation of a man's opinions, his political beliefs, his religion, or private views."

Bella Stander is the daughter of the late Lionel Stander, a film, stage, television and radio actor who was active in many progressive social and political causes. Stander was first subject to an early "blacklist" in the 1930s because of his active role in progressive trade unions and anti-Fascist organizations. Although he was publicly cleared of accusations of being a communist by the Los Angeles District Attorney in 1940, years later he was again accused of being one. He was subpoenaed to appear before HUAC in 1953, and as a result was blacklisted from radio, TV and Hollywood. Lionel Stander sparred vigorously with the Committee, defending his constitutional rights and denouncing HUAC for trampling them, which made front-page news from coast to coast. Columnist Walter Winchell, who had supplied material on

Stander to the FBI, then demanded that he be ousted from his role in the touring production of "Pal Joey." J. Edgar Hoover wrote in his FBI file, which covers some 30 years: "Be certain Stander doesn't use FBI to regain respectability."

Jo Wilkinson is the daughter of Frank Wilkinson, the director of the Los Angeles Housing Authority in the 1940s. In early 1952, he was called before the California State Un-American Activities Committee, ostensibly to testify on the alleged infiltration of communists into the administration of public housing. Wilkinson appeared but refused to answer questions, and was fired from his job as a result. Jo Wilkinson's mother, Jean, also refused to testify about her political beliefs, and was fired from her job as a public school teacher. She was not able to obtain employment again as a public school teacher until 1965. In 1956, and again in 1958, Frank Wilkinson appeared before HUAC, but refused to answer questions. Instead, he asserted that the Committee's role and questions violated the First Amendment. In 1961, he was jailed for contempt of Congress and served nine months in federal prison. The Wilkinson home was firebombed during this time and, like many other families, the Wilkinson's were subject to constant surveillance from unidentified men in unmarked cars.

Becca Wilson and **Rosanna Wilson-Farrow** are the daughters of screenwriter Michael Wilson, who was called to testify before the HUAC in late 1951. Wilson served honorably as a Marine lieutenant in the Pacific Campaign during World War II. When he was called to appear before the Committee and refused to answer certain of their questions, Wilson was branded an "unfriendly witness" and blacklisted. Just six months later, he won his first Oscar for Best Screenplay for "A Place in the Sun," which he had written before being blacklisted. Because of the blacklist, for 15 years Wilson was forced to write "under the table," work for a fraction of his former compensation, and was denied the honors and public acclaim he would have received for his extraordinary creative achievements. Wilson had to live in exile with his family for eight years in order to be able to work as a writer. In 1956 Michael Wilson's screenplay for Friendly Persuasion was nominated for the Academy Award, and was strongly favored to win, but he was quietly disqualified because of the blacklist. His name did not appear in the credits, and became one of the only films in Hollywood history credited to no screenwriter at all. In 1957, Wilson and another blacklisted writer, Carl Foreman, cowrote the screenplay for *The Bridge Over the River Kwai.* Because of the blacklist, the film's screenwriting credit simply said, "Screenplay Based on the Novel by Pierre Boulle." Although the film won the Academy Award for "Best Writing, Screenplay Based on Material from Another Medium," the Oscar statuette went to Boulle, the novelist on whose book the screenplay was based, a Frenchman who barely spoke English. Wilson also wrote the screenplay for 1962's "Best Picture" Oscar winner, *Lawrence of Arabia.* For three decades, he was denied writing credit for these and other films considered among the best screenplays of the twentieth century. As a result of pressure on the Motion Picture Academy exerted by Wilson's surviving friends in the screenwriters' guild, in 1984 Wilson was awarded a posthumous Oscar for *Bridge Over the River Kwai,* and posthumous Oscar nominations for *Lawrence of Arabia* in 1984, and *Friendly Persuasion* in 1995. Michael Wilson's family suffered emotionally and financially due to the blacklist. All of this took an enormous toll on Wilson, who died at a relatively young age.